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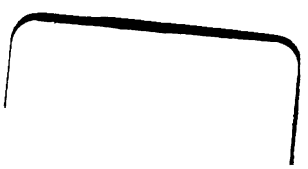
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THE

LAW OF REAL PROPERTY

BEING

A COMPLETE COMPENDIUM OF REAL ESTATE LAW, EMBRACING ALL CURRENT CASE LAW, CAREFULLY SELECTED, THOROUGHLY ANNOTATED AND ACCURATELY EPITOMIZED; COMPARATIVE STATUTORY CONSTRUCTION OF THE LAWS OF THE SEVERAL STATES; AND EXHAUSTIVE TREATISES UPON THE MOST IMPORTANT BRANCHES OF THE LAW OF REAL PROPERTY.

EDITED BY

EMERSON E. BALLARD

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"DEED FORMS ANNOTATED," AND ONE OF THE AUTHORS OF "BALLARDS' REAL ESTATE STATUTES OF INDIANA," "BALLARDS' REAL ESTATE STATUTES OF KENTUCKY," "BALLARDS' OHIO LAW OF REAL PROPERTY."

VOL. 6

CHICAGO, ILL.

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PREFACE.

In editing the new cases which this volume adds to our serial, no material departure has been made from the original plan; but we have sought to emphasize those features which practical use has proved of value to the busy lawyer, and have given special attention to those subjects not hitherto fully treated. So far as possible the value of a case as authority is indicated by the manner in which it is treated. Special reference is made to those opinions which display learning and research upon the subject under consideration, the language of the court and its citations upon the point frequently being given in full. The startling extent to which the value of any case as authority to the practitioner, in another jurisdiction, is frequently increased or diminished by the existence of a statute has led us to make a special effort clearly to indicate to what extent an opinion applies or construes a statute. In the preparation of this volume the examination and citation of the new statutes has not been confined to those subjects upon which a special treatise has heretofore been published in the series, but the latest Session Laws of all the states and territories have been examined for new or amendatory statutes upon every phase of the law of real property, and to all such statutes proper references have been given. These statutes are conveniently arranged in appropriate sections. If a new statute amends a former statute, references to both are given, and where a new statute appertains to some subject of general importance its provisions are either quoted or concisely stated. This addition, which will become a permanent feature of our serial, will make it not only a complete compendium of the current case law of the Law of Real Property, but will keep the profession advised of the growth and changes in the statute law of the several states and territories on this subject.

E. E. B.

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ABSTRACTS AND ABSTRACTERS.

Sec. 1. Definition and purpose of an abstract of title. An abstract of title is a short methodical summary of the documents and facts which affect the title to a piece of land. American and English Enc. of Law (Rev. Ed.), p. 211; Martindale on Abstracts, 8. The definition of Mr. Warvelle is as follows: "A condensed history of the title of land, consisting of a synopsis or summary of the material or operative portion of all conveyances, of whatever kind or nature, which in any manner affects said land, or any estate or interest therein, together with a statement of all liens, charges or liabilities to which the same may be subject, and for which it is in any way material for purchasers to be apprised." Warvelle on Abstracts, § 2. Omitting the last part concerning liens and charges, this definition has been twice approved by the Indiana supreme court. *Roberts* v. *Vornholt*, 126 Ind. 511 (26 N. E. Rep. 207); *Hoover* v. *Weesner*, 147 Ind. 510 (45 N. E. Rep. 650; 46 N. E. Rep 905). As the term is generally used in the United States, it may be defined as a synopisis of what appears on the public records affecting the title to any tract of realty. *Union Safe Deposit Co.* v. *Chisholm*, 88 Ill. App. 647; *Constantine* v. *East*, 8 Ind. App. 291 (35 N. E. Rep. 844); *Smith* v. *Taylor*, 82 Cal. 533 (28 Pac. Rep. 217); *Stevenson* v. *Polk*, 71 Iowa 278 (32 N. W. Rep. 340); Anderson's Law Dictionary, 9; Burrell's Law Dictionary; *Banker* v. *Caldwell*, 3 Minn. 94; *Loring* v. *Oxford*, 18 Tex. Civ. App. 415 (45 S. W. Rep. 895). An abstract ordinarily means a mere brief and not a copy of that from which it is taken. *Dickinson* v. *Railroad Co.*, 7. W. Va. 390, 418. It may consist of a note of a single conveyance, as it always does where the patentee furnishes an abstract of his title. *Heinsen* v. *Lamb*, 117 Ill. 549 (7 N. E. Rep. 75). The purpose of an abstract is to enable one interested in the title to land to determine its sufficiency without referring to the original sources for information. Warvelle on Abstracts, p. 10; Curwen on Abstracts of Title, § 36; *Taylor* v.

Williams, 2 Colo. App. 559 (31 Pac. Rep. 504); Preston on Abstracts of Title, 41; Willard on Real Estate and Conveyancing (2nd Ed.), p. 527; 1 Am. & Eng. Enc. Law (Rev. Ed.), p. 211.

Sec. 2. What an abstract should contain. An abstract of title should contain a note of all conveyances, transfers or other facts relating to the particular title under examination, together with all such facts appearing of record as may impair it. *Heinsen* v. *Lamb*, 117 Ill. 549 (7 N. E. Rep. 75); *Wakefield* v. *Chowan*, 26 Minn. 379 (4 N. W. Rep. 618). Not only should the line of the title be clearly traced out, but all incumbrances, all chances for eviction, and adverse claims which are of record should be shown. The material parts of all patents, deeds, wills, judicial proceedings and other records or documents which touch the title, and also liens and incumbrances of every nature, should be set forth. *Taylor* v. *Williams*, 2 Colo. App. 559 (31 Pac. Rep. 504); *Banker* v. *Caldwell*, 3 Minn. 94; *Thomas* v. *Schee*, 80 Ia. 237 (45 N. W. Rep. 539); American and Eng. Enc. of Law (Rev. Ed.) 211; Warvelle on Abstracts, ch. 1, § 4. Most American writers follow the English authors and declare that all matters *in pais*, such as births, majorities, marriages, descents and successions, which connect the different parts of the title should be shown, but this is not the practice in this country, and an abstracter would not be liable in damages for omitting from the abstract any matter not appearing of record. In England it is held that in abstracting a sale by the court it is necessary to set forth in the abstract enough of the proceedings in the suit to show that the court had jurisdiction, *Waters* v. *Waters*, 36 L. J., Ch. 195; 15 W. R. 191; but this is not customary in the United States, the prevailing practice being to state the important facts of the case, such as the nature of the proceedings, the names of the parties, the date of the commencement of the action and the judgment or decree, and the amount of the judgment, leaving to the party that examines the abstract the responsibility of determining the question of jurisdiction. It is also held in England that where the abstract shows a good equitable title, it need not show the devolution of the legal estate. *Camberwell, etc., Bldg. Society* v. *Holloway*, 13 Ch., Div.

754. But this is under the rule requiring the vendor to show simply a good merchantable title. The term abstract of title is used in this country with reference to the recording statutes which are in force in all the states, by which the whole title is contained in instruments of record; at least so far as third parties who are innocent purchasers are concerned. Therefore, an American abstract should include a concise statement of what appears on the public records affecting the title to the property in question, whether it shows an equitable title, a legal title, or no title. *Union Safe Deposit Co.* v. *Chisholm*, 33 Ill. App. 647; *Heinsen* v. *Lamb*, 117 Ill. 549 (7 N. E. Rep. 75); *Smith* v. *Taylor*, 82 Cal. 533 (23 Pac. Rep. 217).

Sec. 3. Duties of abstracter—Legal knowledge required. He should make a full and true search and examination of the records relating to the title under investigation, and note upon the abstract accurately every transfer, conveyance or other instrument of record in any way affecting the same. *Wacek* v. *Frink*, 51 Minn. 282 (53 N. W. Rep. 633; 38 Am. St. Rep. 502); *Wakefield* v. *Chowan*, 26 Minn. 379 (4 N. W. Rep. 618). He should note all unsatisfied liens, although he doubts their validity. *Gilman* v. *Hovey*, 26 Mo. 280. It has been held that no duty is imposed on an abstracter to inquire into the existence of any judgment entered, or conveyances recorded, prior to the date mentioned as the commencement of the search, and that it is not necessary for him to investigate or state whether the title vested in any grantee during that period is affected by any prior conveyance or any estoppel growing out of the covenants therein. *Wakefield* v. *Chowan*, 26 Minn. 379 (4 N. W. Rep. 618); *Dodd* v. *Williams*, 8 Mo. App. 278. But these decisions are contrary to the prevailing rule, and should not be followed. Parties searching the records for a chain of title should not stop at the day and the hour at which the evidence of a title in a certain grantee is filed for record, but should go back to the date of that title as shown by the record; for the grantee may have made conveyances affecting the title between the dates of his receiving title and recording his deed. *Higgins* v. *Dennis*, 104 Ia. 605 (74 N. W. Rep. 9). In all cases where a

lien or other incumbrance first *attaches* during the period covered by the examination it should be referred to in the abstract, whatever may have been the date of its inception. Warvelle on Abstracts, p. 92. An abstracter sustains a relation of trust and confidence towards his employer, so as to make him a trustee for the latter, of a title acquired in violation of such relation. *Vallette* v. *Tedens*, 122 Ill. 607 (14 N. E. Rep. 52; 8 Am. St. Rep. 502).

It has been said that in preparing an abstract, no professional opinion as to the legal effect of the instruments abstracted is required; that the abstracter has only to furnish the facts from the records, and the purchaser, mortgagee or his counsel, determines for himself their sufficiency. *Dickle* v. *Abstract Co.*, 89 Tenn. 431 (14 S. W. Rep. 896; 24 Am. St. Rep. 616); *West Jersey Title and Guaranty Co.* v. *Barber*, 49 N. J. Eq. 474 (24 Atl. Rep. 381). And yet, "by their profession, abstracters are required to have a sufficient knowledge of law to know what is and what is not a lien upon real estate, and to use sufficient diligence to find any such incumbrances when properly made matter of record, so as to affect all parties interested with notice." *Dodd* v. *Williams*, 8 Mo. App. 278. The making of a perfect abstract of title to a piece of land, with all the incumbrances which affect it, involves a great exercise of legal learning and careful research. The person preparing such an abstract should understand fully all the laws on the subject of conveyancing, descents and inheritances, uses and trusts, devises and, in fact, every branch of the law that can affect real estate in its various mutations from owner to owner. *Banker* v. *Caldwell*, 3 Minn. 94.

Sec. 4. Period for which title should be shown. The old rule in England was that the abstract should show the title for sixty years, Williams on Real Property (6th Ed.), 450; Sugden on Vendor and Purchaser (18th Ed.), 281, and this was said to be by analogy to the statute of limitation against a writ of right. Willard on Real Estate and Conveyancing (2nd Ed.), 527; Martindale on Abstracts, § 17. As succeeding statutes have shortened the time necessary to bar an action for real property, the period of time for which the title should be shown has been lessened. Under the Vendor and Pur-

chaser Act of 1874, any abstract that shows title for forty years is sufficient. *Bolton* v. *London School Board*, 7 Ch. Div. 766; *In re*, *Johnson*, 30 Ch., Div. 42. But by the same act, recitals in deeds over twenty years old are *prima facie* evidence of the facts recited, and where the title begins from a deed over twenty years old, reciting seizin in fee, the vendee cannot demand further abstracts, except so far as he may prove the recitals inaccurate. *Bolton* v. *London School Board*, 7 Ch. Div. 766. No rule exists in the United States as to the period required to be covered by an abstract, but the universal custom is to carry the title back, where possible, to the original patent from the United States government. In the older states it is sometimes impossible, because of the condition of the records to trace the titles from the original patent. In such cases it is said the title should be shown for a period of forty years. Martindale on Abstracts, §§ 17 and 19. "Whenever practicable the abstract should disclose the inception of title, irrespective of time; but where this cannot readily be done, it should commence with some well authenticated fact at some period remote enough to cover any adverse interest or equity that could successfully be asserted." Warvelle on Vendors, p. 298. When an abstracter agrees to furnish an abstract of title to certain lands from and after a specified date, he is under no obligation to inquire as to the existence of judgments entered or conveyances recorded prior to that date. He is not required to inquire or certify as to any lien arising under any such prior judgment, though the same attached to and became operative upon land after that time; nor would he be required to inquire or state whether the title vested in any grantee during the period covered by the contract was affected by any prior conveyance, or any estoppel growing out of any covenants therein. *Wakefield* v. *Chowan*, 26 Minn. 379 (4 N. W. Rep. 618). In *Dodd* v. *Williams*, 8 Mo. App. 278, it is decided that deeds recorded before the grantor has any record title, may be safely disregarded in an examination of title under the system of registration and notice existing in Missouri, that such deeds are not constructive notice to an innocent purchaser, and the examiner is not bound to look for deeds of any person through whom the title passes, before the date of his record title. To the same effect are *State* v. *Bradish*, 14 Mass. 296

and the dissenting opinion of Potter, J., in *McCusker* v. *McEvoy*, 10 R. I. 606. However, the safer plan would be to extend the search back at least to the date of the execution of the recorded deed.

Sec. 5. Nature of liability of abstracters. The existof a liability on the part of persons who engage in the business of searching records, examining titles, and preparing abstracts, for compensation, is well established. Wharton on Neg., § 749; Sher. & Red. on Neg., § 574; Story on Bailments, § 431; Weeks on Attys., § 267. But as to the nature of the liability thus assumed the authorities have not been altogether in harmony. It appears to be settled, however, that the contract is not one of indemnity, but merely an undertaking that the abstracter will faithfully and skillfully perform his work. *Dundee Mortgage Co.* v. *Hughes*, 20 Fed. Rep. 89; *Wacek* v. *Frink*, 51 Minn. 282 (53 N. W. Rep. 633; 38 Am. St. Rep. 502); *Rankin* v. *Schaeffer*, 4 Mo. App. 108; *Thomas* v. *Schee*, 80 Iowa 237 (45 N. W. Rep. 539). "One who holds himself out as an examiner of titles to real estate and maker of abstracts thereof, impliedly undertakes that he possesses the requisite knowledge and skill for such employment, and, if he contracts to render such service he is bound to exercise ordinary skill and care in making the examination and the abstract." *Brown* v. *Sims*, 53 N. E. Rep. 779. The liability of an examiner is for breach of contract, and not in tort. *Russell* v. *Polk County Abs. Co.*, 87 Iowa 238 (54 N. W. Rep. 212; 43 Am. St. Rep. 381); *Lattin* v. *Gillette*, 95 Cal. 317 (30 Pac. Rep. 545; 29 Am. St. Rep. 115). The foundation of an action for damages against an abstracter for any error in his abstract is his implied promise to perform with care, diligence and sufficient skill the duty undertaken for the compensation agreed upon. *Smith* v. *Holmes*, 54 Mich. 104 (19 N. W. Rep. 767); *Lattin* v. *Gillette*, 95 Cal. 317 (30 Pac. Rep. 545; 29 Am. St. Rep. 115); *Gilman* v. *Hovey*, 26 Mo. 280; *Clark* v. *Marshall*, 34 Mo. 429; *Dodd* v. *Williams*, 8 Mo. App. 278; *Chase* v. *Heaney*, 70 Ill. 268; *Wakefield* v. *Chowan*, 26 Minn. 379; *Wacek* v. *Frink*, 51 Minn. 282 (53 N. W. Rep. 633; 38 Ann. St. Rep. 502); *Dickle* v. *Abstract Co.*, 89 Tenn. 431 (14 S. W. Rep. 896; 24 Am. St. Rep.

616). In some of the states the liability of abstracters is prescribed and regulated by statute. Under these statutes such officers are often declared liable for all loss or damage which may happen by reason of any false or erroneous certificate of search, not only to the person or persons to, for, or upon whose order the said certificate was made or given, but also to any person claiming title through, from or under them, or who may suffer loss by reason of the making of such false or erroneous certificate. *Gate City Abstract Co.* v. *Post*, 55 Neb. 742 (76 N. W. Rep. 471).

Sec. 6. Liability of abstracter for negligence, fraud or mistake. If the abstracter fails to make necessary searches, or searches without due care, or fails to state in the abstract a material fact discovered by his searches, he is liable to an action for damages. *Gilman* v. *Hovey*, 26 Mo. 280; *Clark* v. *Marshall*, 84 Mo. 429; *Smith* v. *Holmes*, 54 Mich. 104 (19 N. W. Rep. 767); *Chase* v. *Heaney*, 70 Ill. 268; *Wakefield* v. *Chowan*, 26 Minn. 379 (4 N. W. Rep. 618); *Wacek* v. *Frink*, 51 Minn. 282 (53 N. W. Rep. 633 38 Am. St. Rep. 502): *Cooper* v. *Stephenson*, 16 Jur. 424; *Thomas* v. *Schee*, 80 Ia. 237 (45 N. W. Rep. 539). An abstracter must examine the records themselves, and if he relies upon the indexes thereto or marginal references thereon, and damage results therefrom, he is liable for the loss. *Wacek* v. *Frink*, 51 Minn. 282 (53 N. W. Rep. 633; 38 Am. St. Rep. 502). Where an abstracter gives a certificate that he has made an examination and finds no incumbrances against certain property, he will be liable if an incumbrance is of record in such a way as to give constructive notice to every one interested, and actual notice to every one looking for it in the proper way. *Dodd* v. *Williams*, 3 Mo. App. 278.

Damages for negligence are recoverable against a person engaged in searching the records and certifying to titles who undertakes to furnish a party a full abstract of title to land which the latter desires to purchase, if, in consequence of the careless omission therefrom of an incumbrance, the purchaser is put to additional expense to perfect the title. *Smith* v. *Holmes*, 54 Mich. 104 (19 N. W. Rep. 767). One employed to prepare an abstract of title may be held liable for omitting

a statement as to taxes assessed against the property, *Morange* v. *Mix*, 44 N. Y. 315; for failure to state that the property had been sold for taxes, *Chase* v. *Heaney*, 70 Ill. 268; or for an erroneous statement of the amount of land embraced in a conveyance, *Clark* v. *Marshall*, 84 Mo. 429; but where the certificate of an abstract company, "guarantees the above to be a true abstract of the records so far as they relate to the premises described at the head of this brief from the date of the first conveyance or decree of court shown therein," is not false so as to render the company liable if it contains an abstract of all instruments relating to the land described, because of the fact that it does not point out discrepancies in measurements affecting the title to the land. *American Trust Inv. Co.* v. *Nashville Abstract Co.*, Tenn. (39 S. W. Rep. 877). An attorney at law, holding himself out as a competent person to make and certify abstracts of title who induces parties to buy of him a tract of land by presenting them with an abstract of title thereto on which he certified in writing that "he had carefully examined the title to said lands, and that the same was a full, true and complete abstract of said title," is liable for damages resulting to the purchasers on account of his fraudulent entries as to the character of his title. *Thomas* v. *Schee*, 80 Iowa 287 (45 N. W. Rep. 589).

Where an abstracter, without any fraudulent purpose, makes a mistake in an abstract of title, the party employing him cannot hold the abstracter liable for the loss occasioned thereby unless he uses ordinary diligence in informing the abstracter of such mistake, where the loss could be averted, if the abstracter were so informed. *Roberts* v. *Leon Loan and Abstract Co.*, 63 Iowa 76 (18 N. W. Rep. 702). So, where the plaintiff employed the defendant to make an abstract of title for her, and the defendant carelessly, but without any fraudulent intent, made a mistake in such abstract, whereby the plaintiff was led to believe that she had ten days longer than she actually had in which to redeem her land from a sheriff's sale, and she learned of the mistake one day before the time for redemption expired, it was held that she could not recover of the defendant the loss occasioned by her inability to redeem the land, unless she used ordinary diligence

in endeavoring to get the money to redeem after the mistake was discovered, and in informing the defendant promptly of the mistake. *Roberts* v. *Leon Loan and Abstract Co.*, 63 Iowa 76 (18 N. W. Rep. 702). Where the plaintiff employed a company engaged in the business of examining and guaranteeing titles to search the title for her and make the conveyance, and through the company's fault the deed was made to the lot adjoining that purchased by the plaintiff, upon which there was a mortgage which was foreclosed and the property sold, the company was held to be liable, and the plaintiff was under no obligation to attempt to sell the lot to which she had title in order to reduce the damages, even though she had previous to the foreclosure had her deed reformed and secured title to the lot actually purchased. *Elmer* v. *Title Guarantee Co.*, 156 N. Y. 10 (50 N. E. Rep. 420).

A party cannot recover against an abstracter for a false certificate of title, where he does not examine the abstract or have any one do so for him. *Trimble* v. *Stewart*, 35 Mo. App. 537. No recovery can be had against an abstracter for failure to report a judgment lien against the property where his employer had purchased the property before he made the examination, and advanced no money on the faith of the statements in the abstract. *Roberts* v. *Sterling*, 4 Mo. App. 593; *U. S. Wind Engine and Pump Co.* v. *Linville*, 43 Kan. 455 (23 Pac. Rep. 597). It was held in *Roberts* v. *Sterling*, 4 Mo. App. 593, that there could be no recovery where a judgment, which is omitted from the abstract, is voluntarily paid and satisfied of record by the purchaser. An abstracter is not liable to his employer beyond nominal damages for failure to note on an abstract a lien junior to his employer's claim of title, unless it appears that he has necessarily suffered special damages on account of such omission. *Williams* v. *Hanley*, 16 Ind. App. 464 (45 N. E. Rep. 622). The abstracter is not liable where the existence of a lien omitted from the abstract could be material to the purchaser only on account of an understanding between him and his grantor, of which the abstracter had no notice, and by reason of which a deed, appearing on its face to be absolute, was held to be a mortgage. *Roberts* v. *Sterling*, 4 Mo. App. 593. The fact that the borrower knew of the existence of the omitted liens, and acted as

the agent of the lender in ordering the certificate, will not relieve the recorder from liability for errors and omissions in a certificate of search to a party loaning money and relying on the certificate. *Houseman* v. *Girard B. & L. Assn.*, 81 Pa. St. 256.

Sec. 7. Liability of abstracter—Measure of damages. The measure of damages for an abstracter's failure correctly to state the condition of the title is his employer's actual loss, which is usually the amount that he had to pay to get the title, or to get the incumbrances removed. *Allen* v. *Clark*, 7 L. T. N. S. 781; *Dodd* v. *Williams*, 3 Mo. App. 278; *Morange* v. *Mix*, 44 N. Y. 315; *Chase* v. *Heaney*, 70 Ill. 268. An abstracter who has omitted a mortgage from an abstract prepared for an intending purchaser of lands cannot be held liable for any payments made after the purchaser has notice of the mortgage. *Brega* v. *Dickey*, 16 Grant's Ch. (U. C.) 494. A party examining a title for another is liable to the extent of any loss sustained on account of any mistake arising from a want of ordinary professional skill or care, but he is not a guarantor or warrantor that there will be no loss. *Dundee Mortgage Co.* v. *Hughes*, 20 Fed. Rep. 89; *Wacek* v. *Frink*, 51 Minn. 282 (53 N. W. Rep. 633; 38 Am. St. Rep. 502); *Rankin* v. *Schaeffer*, 4 Mo. App. 108. The maker of an abstract is liable only for the damage which is the direct consequence of his error or mistake. He is not liable for any loss resulting to his employer on account of defects in the abstract to the extent such loss could have been averted or lessened by prompt action on the part of such employer. *Kimball* v. *Connolly*, 33 How. Pr. 247; *Roberts* v. *Leon Loan Co.*, 63 Ia. 73 (18 N. W. Rep. 702). Where an abstracter or attorney is negligent in preparing or examining an abstract for a mortgagee, the mortgagee may recover the difference in value between the security he contracted for and that which he actually received. *Lawall* v. *Groman*, 180 Pa. St. 532 (37 Atl. Rep 98; 57 Am. St. Rep. 662). A party furnishing a certificate of title is responsible for the amount loaned on a mortgage, on the faith of his certificate that the property mortgaged was free of incumbrances, when, in fact, it was

mortgaged for more than its full value, and the money is thereby lost to the lender. *Fox* v. *Thibault*, 83 La. Ann. 82.

Sec. 8. Limiting liability of an abstracter. An abstracter may limit his liability to the correctness of the abstract and fullness of search to certain records, ei her by a specific contract to that effect, or by specifying in his certificate the records examined. *Thomas* v. *Carson*, 46 Neb. 765 (65 N. W. Rep. 899). But he cannot limit his liability by an obscure statement in the certificate to the abstract, without specially calling the attention of the party employing him thereto. If he discovers that he cannot furnish a complete and reliable abstract, it is his duty to give his employer notice of the fact, that he may apply elsewhere; otherwise, such employer will have a right to rely on his competency and fidelity in this respect. *Chase* v. *Heaney*, 70 Ill. 268. A statement in a certificate that the party examining the records finds no conveyance or incumbrance affecting the title, is equivalent to a statement that there are none. *Ziegler* v. *Commonwealth*, 12 Pa. St. 227; *Philadelphia* v. *Anderson*, 142 Pa. St 357 (21 Atl. Rep. 976).

Sec. 9. Liability of public officers examining titles. In some of the states abstracters are not permitted to search the public records; and, in others, they are required to pay the custodian a fee for the privilege of searching. In such states, it is the practice of the abstracter, after having ascertained the chain of title, to direct written requisitions to the clerks of the various offices for searches for incumbrances or liens of record that may affect the property. Whenever, by statute or custom, it is made an official duty of the officer to make such searches, he is held liable for mistakes and omissions and false certificates of search, to the same extent as an abstracter. *McCaraher* v. *Commonwealth*, 5 Watts & S. 21 (39 Am. Dec. 106); *Ziegler* v. *Commonwealth*, 12 Pa. St. 227; *Houseman* v. *Girard B. & L. Assn.*, 81 Pa. St. 256; *Siewers* v. *Commonwealth*, 87 Pa. St. 15; *Peabody B. & L. Assn.* v. *Houseman*, 89 Pa. St. 261 (33 Am. Rep. 757); *Kimball* v. *Connolly*, 33 How. Pr. 247; *Lusk* v. *Carlin*, 5 Ill. 395; *Smith* v. *Holmes*, 54 Mich. 104 (19 N. W. Rep. 767); *Tripp* v. *Hop-*

kins, 13 R. I. 99; *Fox* v. *Thibault*, 38 La. Ann. 82. The first, second, sixth, seventh and last cases cited above hold that where such a duty exists, sureties on the bond of the officer may be held liable for his failure correctly to perform it. A duty sufficient to create such liability on the part of an officer need not be expressly created by statute, but may be implied from the fact that he may charge a fee for his services, or be created by custom. *McCaraher* v. *Commonwealth*, 5 Watts & S. 21 (39 Am. Dec. 106); *Lusk* v. *Carlin*, 5 Ill. 395; *Zeigler* v. *Commonwealth*, 12 Pa. St. 227. In the last case cited the sureties of an officer were held liable although he charged no fee, and did not attach his official seal to the certificate. The decisions of other states are that where there is no statute requiring the officer to make searches, and especially where the statute specifies no compensation therefor, he is not liable without a contract with the party for whom the search is made, or unless the certificate is falsely made with an intent to defraud. *Mechanics Bldg. Assn.* v. *Whitacre*, 92 Ind. 547; *Wood* v. *Ruland*, 10 Mo. 143; *Mallory* v. *Ferguson*, 50 Kan. 685 (32 Pac. Rep. 410; 22. L. R. A. 99). But if a recording officer undertakes to search the records and certify to titles, he is liable upon such undertaking just as any other person would be. *Mechanics' Bldg. Assn.* v. *Whitacre*, 92 Ind. 547. In the Kansas case cited above it is held that an officer will not be presumed to have agreed to make a careful search and correctly certify to a title on account of his receiving twenty-five cents for his certificate, this being the amount allowed him generally "for each certificate." In New York it is made the duty of certain officials having the custody of official records to make searches, and the officer is liable for any error or misstatement in his certificate. Birdseye's Rev. Stat. (1896), p. 1111, § 83; *Kimball* v. *Connolly*, 33 How. Pr. 247. It was held "misconduct in office" authorizing the removal of a register of deeds where he purposely certified falsely concerning a recorded title, although such certificate was out of the line of his official duty and was not made with an intent to defraud any one. *State* v. *Leach*, 60 Me. 58 (11 Am. Rep. 172).

Public officers examining titles do not, unless by express contract, guarantee the correctness of their work, but they do

agree that they possess the requisite knowledge and skill, and that they will exercise reasonable care and diligence in the performance of their undertaking. If they fail in this performance, whereby the person who employs them suffers proximate injury, they are liable for the damage sustained. Mechem on Public Officers, § 74. A recorder of deeds is liable to a building association for omitting from his certificate of title mention of a mortgage on the representation of the party acting for the association in ordering the abstract that the mortgage should be satisfied where the solicitor of the association allowed the applicant for a loan to procure the searches. *Peabody B. & L. Assn.* v. *Houseman*, 89 Pa. St. 261 (33 Am. Rep. 757). A custodian of the records is not liable for omitting a mortgage from his certificate of search if the mortgagor's name is not correctly given in the order for the search. *Commonwealth* v. *Owens*, 2 Wkly. Notes Cases, 200. When the liability exists the officer is liable for the mistakes and omissions of his deputies, clerks, and persons in his employ. *Peabody B. & L. Assn.* v. *Houseman*, 89 Pa. St. 261 (33 Am. Rep. 757); *Kimball* v. *Connolly*, 33 How. Pr. (N. Y.) 247. His liability, like that of an abstracter's, is only to those who employ him, or others in privity of contract with him. *Commonwealth* v. *Kellogg*, 6 Phila. Rep. 90; *Houseman* v. *Girard B. & L. Assn.*, 81 Pa. St. 256; *Siewers* v. *Commonwealth*, 87 Pa. St. 15; *Mallory* v. *Ferguson*, 50 Kan. 685 (32 Pac. Rep. 410; 22 L. R. A. 99). Such an officer may limit his liability by his certificate, or it may be limited by the requisition of the search. *Tripp* v. *Hopkins*, 13 R. I. 99. In *Commonwealth* v. *Owen*, 2 Wkly. Notes Cases 200, it was held that a recording officer was not liable for omitting judgments against Talman when the search is ordered against Tolman, even though the officer certified as to the existence of three judgments against Talman. The duty of recording officers is simply to search for and ascertain the existence or non-existence of certain records and documents. It is no part of their duty to determine and give an opinion upon the character and effect of such records, or of any judgment proceeding in attachment, claim under a mechanic's lien, or other such record found in his office. *West Jersey Title and Guaranty Co.* v. *Barber*, 49 N. J. Eq. 474 (24 Atl. Rep. 381): *Lusk* v. *Carlin.*

5 Ill. 895. In *U. S. Wind Engine and Pump Co.* v. *Linville*, 48 Kan. 455 (28 Pac. Rep. 597), it was held that where an abstract was presented by the plaintiff to the clerk at the time of his search, showing a conveyance to the plaintiff of certain lots long before a lien was filed against the lots in the office of the clerk, and the plaintiff had suffered no loss because of the action of the clerk, no cause of action existed against him, even though he had made a false statement to plaintiff as to liens upon said lots.

Sec. 10. Duty and liability of attorney examining an abstract. Attorneys employed to investigate the title of real property, impliedly contract to exercise reasonable care and skill in the performance of the undertaking, and if they are negligent, or fail to exercise such reasonable care and skill in the discharge of the stipulated service, they are responsible to their employers for the loss occasioned by such neglect or want of care or skill. 2 Shear. & R. Neg., § 574; *Savings Bank* v. *Ward*, 100 U. S. 195; Addison Contr. (8th Ed.), 598; *Rankin* v. *Schaeffer*, 4 Mo. App. 108. An attorney examining a title does not warrant or guarantee the correctness of his work. He only undertakes to bring to the discharge of his duty reasonable skill and diligence, *Dundee Mortgage Co.* v. *Hughes*, 20 Fed. Rep. 89; *Byrnes* v. *Palmer*, 45 N. Y. Supp. 479; *Rankin* v. *Schaeffer*, 4 Mo. App. 108, and he is not liable for every error of judgment or opinion as to the law, *Watson* v. *Muirhead*, 57 Pa. St. 161 (98 Am. Dec. 213); *Byrnes* v. *Palmer*, 45 N. Y. Supp. 479. But in the last case it is held that it was his duty to see that his client obtains a marketable title, and to reject titles involved in doubt, unless the client is fully informed of the nature of the risk and is willing to accept it. And in *Page* v. *Trutch*, 18 Fed. Cases, 995, it was decided that if an attorney certifies to a mortgagee that the security is good, he thereby *warrants* that the title shall not only be found good to the end of a contested litigation, but that it is free from any palpable grave doubts, or serious question as to its validity.

If an attorney, in taking the opinion of counsel as to a question of title, omits to state in the case certain deeds materially affecting the title, and upon the faith of the opinion

given by the counsel (which would have been different had all the deeds been stated) the client makes a purchase, the attorney is liable in an action for negligence if the title is found to be imperfect. *Ireson* v. *Pearman*, 5 Dowl. & R. 687. It is actionable negligence for an attorney, in examining title to land which had been sold under a judgment of foreclosure, not to observe that a release of part of the mortgaged premises described the portion retained, and not the portion released. *Byrnes* v. *Palmer*, 45 N. Y. Supp. 479. When any part of a title is dependent upon a judgment or decree of court, it is the plain duty of an attorney examining the title to examine the judgment or decree, and especially to investigate the question of jurisdiction, in order to determine the validity, character and extent of the judgment. *Moot* v. *Business Men's Assn.*, 157 N. Y. 201, 209 (52 N. E. Rep. 1). If a client himself has made inquiries about the matter and leads his attorney to believe that he is satisfied about certain points, it is not negligence for the attorney to omit the investigation of such points, or to fail to take other precautions which otherwise would be usual and necessary. *Waine* v. *Kempster*, 1 F. & F. Nise Prius Rep. 695. An attorney is not liable for giving erroneous information as to the contents of a deed or abstract, where the relation of attorney and client does not exist. *Fish* v. *Kelly*, 17 C. B. (N. S), 194. But where an attorney who was ordinarily the counsel for a borrower, in the matter of a particular loan acted for the lender, but did not make any charge for his service, it was held that he was properly charged as an attorney acting for the lender, and was in that character liable for the loss suffered through the insufficiency of the security. *Donaldson* v. *Haldone*, 7 C. & F., 762. Where an attorney knows that a lender is relying upon him in his professional capacity to see that her mortgage is a first lien, he is liable to her for the results of his negligence, although he was paid for his services by the borrower. *Lawall* v. *Groman*, 180 Pa. St. 532 (37 Atl. Rep. 92; 57 Am. St. Rep. 662).

An attorney is liable for his negligence in certifying to a title to his immediate employer only, and not to the latter's assigns or any third person, between whom and the attorney there is no privity. *Dundee Mtg. Co.* v. *Hughes*,

10 Sawyer 144; *Savings Bank* v. *Ward*, 100 U. S. 195; *Rankin* v. *Schaeffer*, 4 Mo. App. 108. The cause of action against an attorney for errors in the examination of an abstract accrues when the mistake is made. *Rankin* v. *Schaeffer*, 4 Mo. App. 108. Where an attorney for a mortgagee is negligent in his duty of examining the title to the land mortgaged, the mortgagee is entitled to bring suit at once without waiting for the mortgage to be foreclosed, and may recover the difference in value between the security he contracted for, and that which he actually received. The cause of action in such cases is the breach of duty, not the damages, which are only an incident. *Lawall* v. *Groman*, 180 Pa. St. 532 (37 Atl. Rep. 98; 57 Am. St. Rep. 662). In an action against an attorney for wrongfully keeping the plaintiff's abstracts of title, it was held that the proper measure of damages was the cost of procuring other abstracts similar to those detained. However, if the client owes the attorney, the latter can hold any abstracts of the former until paid. *Watson* v. *Cowdry*, 23 Hun. 169.

Sec. 11. To whom an abstracter may be held liable. As a general rule, in the absence of fraud, collusion, or malicious or tortious act, the maker of an abstract is liable for his errors only to the party that employed him, or is in some way in privity of contract with him. *Bank* v. *Ward*, 100 U. S. 195; *Brown* v. *Sims*, Ind. App. (53N. E. Rep. 779); *Mechanic's Bldg. Association* v. *Whitacre*, 92 Ind. 547; *Schade* v. *Gehmer*, 133 Mo. 252 (34 S. W. Rep. 576); *Zweigardt* v. *Birdseye*, 57 Mo. App. 462; *Buckley* v. *Gray*, 110 Cal. 339 (42 Pac. Rep. 900; 52 Am. St. Rep. 83); *Talpey* v. *Wright*, 61 Ark. 275 (32 S. W. Rep. 1072; 54 Am. St. Rep. 206); *Gate City Abstract Co.* v. *Post*, 55 Neb. 742 (76 N. W. Rep. 471); *Thomas* v. *Carson*, 46 Neb. 765 (65 N. W Rep. 899); *Mallory* v. *Ferguson*, 50 Kan. 685 (32 Pac. Rep. 410; 22 L. R. A. 99); *Siewers* v. *Commonwealth*, 87 Pa. St. 15; *Commonwealth* v. *Harmer*, 6 Phil. Rep. 90; *Houseman* v. *Girard B. & L. Assn.*, 81 Pa. St. 256; *Day* v. *Reynolds*, 23 Hun. 131; *Morano* v. *Shaw*, 23 La. Ann. 379; *Dundee Mtg. Co.* v. *Hughes*, 20 Fed. 89; Warvelle on Abstracts, p.

8; Martindale on Abstracts, p. 173. But, inasmuch as the vendee or mortgagee, the only parties likely to be damaged by any mistake or inaccuracy in an abstract, seldom procures the abstract to be made, there has been a tendency to extend the liability to parties other than the employer. The reason for this is thus stated in a late Indiana case: "If the abstracter in all cases be responsible only to the person under whose employment he performs the service, it is manifest that the loss occasioned thereby must in many cases, if not in most cases, be remediless." *Brown* v. *Sims*, Ind. App. (53 N. E. Rep. 779). In this case it is held that, where one employed by a land owner to make an abstract knew that it was to be used to induce a third party to make a loan on the land and that he would rely on it, subsequently delivered the abstract to such proposed mortgagee with the assurance that his work could be relied upon and that the title was correctly shown in the abstract, he should be held liable to such mortgagee for loss sustained by him on account of defects in the title not shown by the abstract. So, in *Dickle* v. *Abstract Co.*, 89 Tenn. 431 (14 S. W. Rep. 896; 24 Am. St. Rep. 616), the plaintiff contracted to purchase land from Bowman, but declined to do so, until furnished with an abstract. Bowman applied to the defendant to make an abstract, and paid for it. The defendant furnished the abstract to Bowman, and guaranteed it to be a true and perfect abstract of title. The plaintiff purchased on the faith of it. The deed from Bowman to the plaintiff was prepared by the defendant. Certain conveyances of a part of the land were not shown by the abstract, and the abstracter was held responsible to the purchaser. In a dissenting opinion in *Savings Bank* v. *Ward*, 100 U. S. 195 (concurred in by JJ. Swayne and Bradley), Mr. Chief Justice Waite says, "I think if a lawyer, employed to examine and certify to the recorded title to real property, gives his client a certificate which he knows or ought to know is to be used by the client in some business transaction with another person as evidence of the facts certified to, he is liable to such other person relying on his certificate for any loss resulting from his failure to find on record a conveyance affecting the title, which, by the use of ordinary professional care and skill, he might have found." Where, upon inquiry, an abstracter affirms the

correctness of his abstract to the grantee or mortgagee of his employer, he will be held liable for loss resulting to such grantee or mortgagee relying upon his abstract, on account of defects therein. *Seiwers* v. *Commonwealth*, 87 Pa. St. 15. See *Houseman* v. *Girard Bldg. Ass'n*, 81 Pa. St. 256; *Peabody Bldg. Ass'n* v. *Houseman*, 89 Pa. St. 261 (33 Am. Rep. 757). That a holding similar to the Indiana and Tennessee cases might be made in New York is indicated in *Day* v. *Reynolds*, 23 Hun. 131, where in holding that there was no liability in that particular case, it was remarked that there was no reason, without proof of the fact, that the defendant should know that the mortgagor or his agent, who procured the making of the search, was to use it in a transaction with the plaintiff, the mortgagee, or with any one else. But in *Zweigardt* v. *Birdseye*, 57 Mo. App. 462, it was said that the abstracter is not liable to any one but his employer, even where he has knowledge that the certificate as to the title is to be used in a sale or loan to advise the purchaser or lender. So, in Louisiana, it has been held that the vendee of a purchaser at a sheriff's sale, though expressly subrogated to all the rights acquired by his vendor under the sheriff's sale, has no right of action against the recorder of mortgages for having given an imperfect and erroneous certificate, whereby his vendor was induced to purchase property charged with incumbrances not made known at the time of the sale. The action for damages is a personal one, and can only be exercised by the purchaser. *Morano* v. *Shaw*, 21 La. Ann. 329. In Pennsylvania it has been held that the liability for a defective search is to the party who procures it alone, and that an action for damages can not be sustained upon a certificate given to an antecedent purchaser. *Siewers* v. *Commonwealth*, 87 Pa. St. 15; *Commonwealth* v. *Harmer*, 6 Phila. 90; *Houseman* v. *Girard B. & L. Assn*, 81 Pa. St. 256. One preparing or examining an abstract for the negotiation of a loan is not liable for errors therein to one taking an assignment of the mortgage, although the assignment was taken in reliance upon the abstract. *Talpey* v. *Wright*, 61 Ark. 275 (32 S. W. Rep. 1072; 54 Am. St. Rep. 206); *Dundee Mtg. Co.* v. *Hughes*, 20 Fed. Rep. 39. When an abstracter is employed by one party, his liability is not affected by the fact that the expense

is paid by another. *Houseman* v. *Girard B. & L. Association*, 81 Pa. St. 256; *Lawall* v. *Groman*, 180 Pa. St. 532 (37 Atl. Rep. 98; 57 Am. St. Rep. 662); *Page* v. *Trutch*, 18 Fed. Cases, 995. The fact that the borrower knew of the existence of the omitted liens, and acted as the agent of the lender in ordering the abstract will not relieve an abstracter from liability to a party loaning money and relying on his certificate. *Houseman* v. *Girard B. & L. Assn.*, 81 Pa. St. 256. Where the owner of land, being an abstracter prepares an abstract of the title to the same, to be used as an inducement to whoever might purchase the land, he is liable to a purchaser thereof for mistakes in the abstract just as much as if the abstract was prepared upon the purchaser's order. *Thomas* v. *Schee*, 80 Iowa 237 (45 N. W. Rep. 539).

Sec. 12. Action against abstracter—Miscellaneous notes. A complaint in an action against an abstracter for damages for a false certificate must show that the plaintiff has been damaged on account of it. *United States Engine Co.* v. *Linville*, 43 Kan. 455 (23 Pac. Rep. 597). It is necessary to prove actual damage, and to show that the loss resulted from the defect wherewith the abstracter is charged. *U. S. Wind Engine Co.* v. *Linville*, 43 Kan. 455 (23 Pac. Rep. 597); *Batty* v. *Fout*, 54 Ind. 482; *Kimball* v. *Connolly*, 33 How. Pr. 247. A complaint by an intending purchaser, to recover damages on account of an error in an abstract is insufficient where it fails to allege that the plaintiff purchased the realty. *Batty* v. *Fout*, 54 Ind. 482. The right to maintain the action is not affected by the fact that the plaintiff has other remedies, as suit on covenants of his grantor, *Gate City Abstract Co.* v. *Post*, 55 Neb. 742 (76 N. W. Rep. 471); and the defendant, who would avail himself of the fact that the plaintiff is protected from loss or has ample redress against another person by covenants against incumbrances, has the burden of proving that a remedy exists which is available to the plaintiff and to which he should resort. *Morange* v. *Mix*, 44 N. Y. 315. In a suit against an abstracter for neglecting to show a judgment and sale thereunder, the defendant contended that no recovery could be had, as it was not shown that the judgment and sale were entered of record. It was held that, in

the absence of proof to the contrary, it would be presumed that the officers did their duty, and promptly make a record of the judgment and sale. *Chase* v. *Heaney*, 70 Ill. 268. In such action the defendant may show that the person against whom the judgment was rendered had other unincumbered real estate in the county, subject to execution, sufficient to satisfy the judgment. *Roberts* v. *Sterling*, 4 Mo. App. 593. In an action against an attorney by a mortgagee to recover damages for loss occasioned by negligence in examining title, declarations of the mortgagor, in the absence of fraud or collusion between him and the attorney, are inadmissible. *Lawall* v. *Groman*, 180 Pa. St. 532 (37 Atl. Rep. 98; 57 Am. St. Rep. 662). Where one's cause of action for damages against an abstracter depends upon his title having been defeated by an outstanding title omitted from the abstract which rested upon the statute of limitations, he cannot recover, where, after obtaining a judgment against the holder of such title, he abandons his judgment and surrenders title to him on account of adverse decisions by the higher court in similar cases, it not being shown that the time for taking an appeal from the judgment had not expired or that possession of the claimant of the outstanding title was such as to give a title under the statute. *Puckett* v. *Waco Abstract & Inv. Co.*, 16 Tex. Civ. App. 329 (40 S. W. Rep. 812).

Sec. 13. When action against abstracter must be commenced. A cause of action against an abstracter of titles for neglect in searching the records and giving a wrong certificate of title, accrues at the date of the delivery of the abstract, and not at the time the negligence is discovered, or consequential damages arise. Hence, an action based on such negligence must be commenced within the period of limitation after that time, or it is barred. *Provident Loan Trust Co.* v. *Wolcott*, 5 Kan. App. 473 (47 Pac. Rep. 8); *Lattin* v. *Gillette*, 95 Cal. 317 (30 Pac. Rep. 545; 29 Am. St. Rep. 115); *Russell & Co.* v. *Polk Co. Abstract Co.*, 87 Iowa 233 (54 N. W. Rep. 212; 43 Am. St. Rep. 381); *Lawall* v. *Groman*, 180 Pa. St. 532 (37 Atl. Rep. 98; 57 Am. St. Rep. 662); *Schade* v. *Gehner*, 133 Mo. 252 (34 S. W. Rep. 576); *Rankin* v. *Schaeffer*, 4 Mo. App. 108 (34 S. W. Rep. 576).

"It has been uniformly held that the statute begins to run from the breach of the contract, although the damage may not be known or may not in fact occur until afterwards." *Lawall* v. *Groman*, 180 Pa. St. 532, 541 (37 Atl. Rep. 98; 57 Am. St. Rep. 662). The fact that an examiner of titles who has certified to the title of a certain piece of property, afterwards, when an action in ejectment is brought against the widow of the party for whom he examined the title, expresses an opinion to such widow that the title is good, does not extend the time within which suit can be brought against him for negligence in his examination. *Schade* v. *Gehner*, 133 Mo. 252 (34 S. W. Rep. 576).

Sec. 14. Who must furnish abstract. In England there is an implied contract on the part of every vendor of a freehold estate in land, to furnish the purchaser an abstract of title. 1 American and Eng. Ency. of Law (Rev. Ed.), p. 211; Williams Real Prop. (6th Ed.), 450; Pomeroy on Specific Perform., § 413. Although the vendor should think fit to deliver his title deeds to a purchaser as a substitute for an abstract, the purchaser would yet have a right to require an abstract of title at the vendor's expense. 1 Preston on Abstracts, p. 84. In this country it has become almost a universal custom in the transfer of real estate for the vendor to furnish to the vendee satisfactory evidence of his title, and this is usually done by furnishing him an abstract. "An abstract has become the usual concomitant of every instrument evidencing an interest or ownership in land." *Gate City Abstract Co.* v. *Post*, 55 Neb. 742 (76 N. W. Rep. 471); Warvelle on Vendors, p. 290. Although this has become customary in the United States, there is no implied obligation on the part of the vendor to furnish an abstract of title, and the vendee cannot demand one as a matter of right, unless there is a provision to that effect in his contract. Warvelle on Vendors, p. 292; Martindale on Abstracts, p. 6; Pomeroy on Specific Perform., § 413; *Carr* v. *Roach*, 2 Duer 20; 1 Am. & Eng. Ency. of Law (Rev. Ed.) 213. Since every title is of record, the application of the doctrine of *caveat emptor*, in the absence of special agreement, requires the purchaser to satisfy himself as to the sufficiency of the title, and for that purpose to procure

an abstract of the title, if he desires it, and to make the necessary investigation. *Easton* v. *Montgomery*, 90 Cal. 307 (27 Pac. Rep. 280; 25 Am. St. Rep. 123); *Espy* v. *Anderson*, 14 Pa. St. 308. In Alabama it is held to be the duty of the vendor, when required, to furnish to the purchaser an abstract of the title. *Wade* v. *Killough*, 5 Stew. and P. 450; *Chapman* v. *Lee*, 55 Ala. 616, 628. But these decisions were based on the English Law, and the fact that the different conditions existing here might change the rule was not noted. In *Brewer* v. *Fox*, 62 Ill. App. 609, it is said that "a vendor must furnish evidence of his title, which, by usage, is an abstract," but this is contrary to the weight of authority. Where the contract requires the vendor to furnish an abstract, and notice is given where the abstract may be found and inspected, if the vendee does not object on that ground, this will be construed as a compliance with the contract by the vendor. *Papin* v. *Goodrich*, 108 Ill. 86.

Sec. 15. Time of delivering the abstract. A contract for the sale of real estate requiring the furnishing of an abstract implies that it should be furnished sufficiently long before the date of the consummation of the sale and payment of the purchase money for the purchaser to have opportunity to examine it. *Jones* v. *Price*, 3 Anstr. 924; *Compton* v. *Bagley*, 1 Ch. 319. When parties make a contract for the sale or exchange of lands which provides for the exhibition of an abstract showing title in the proposing parties by a day named, this is a condition precedent to be performed before either party, in the case of an exchange, or the vendor in case of sale, can call upon the other to perform the agreement, and if the abstract is not satisfactory or fails to show the title agreed to be made, the other may elect to consider the contract at an end. *Howe* v. *Hutchison*, 105 Ill. 501. If the vendor does not have the abstract ready by the appointed time the purchaser may rescind and recover his deposit. *Williams* v. *Daly*, 33 Ill. App. 454; 2 White and Tudor's Leading Cases, 557. When the contract calls for an abstract showing good title by a day certain, the vendor has no right to demand time to furnish an additional abstract if the first is defective. *Howe* v. *Hutchison*, 105 Ill. 501; *Williams* v. *Daly*, 33 Ill. App.

454. But a purchaser who has given the vendor time to remedy defects in an abstract may not rescind for failure to furnish additional abstracts within a reasonable time without notifying the vendor that he will wait no longer, where he receives the abstracts furnished as if he meant to have them examined. *Jackson* v. *Conlin*, 50 Ill. App. 538. Where a vendor agrees to furnish an abstract of title within thirty days from the date of sale, which is not done, and the vendee raises no objection on that ground, and continues to make payments under the contract and otherwise treats it as still in force, he will be deemed to have waived the performance of that condition, and can not obtain a rescission or a recovery of the money advanced by reason of such default. *McAlpine* v. *Reichencker*, 56 Kan. 100 (42 Pac. Rep. 339). Where a contract for the sale of real estate provided that an abstract of title should be furnished in a reasonable time, it was held that what was reasonable time depended on the circumstances of the case. The fact that a payment was to be made within thirty-five days from the date of the contract did not necessarily mean that the abstract should be furnished within that time. *Jackson* v. *Conlin*, 50 Ill. App. 538.

Sec. 16. **Examination of abstract and removal of defects in the title.** It is well settled that a purchaser can not be compelled to accept a doubtful or incumbered title, but it devolves upon him to show that the title for which he has contracted is doubtful or insufficient in any way. *Patten* v. *Stewart*, 24 Ind. 332; *Dwight* v. *Cutler*, 3 Mich. 566 (64 Am. Dec. 105); *Daily* v. *Litchfield*, 10 Mich. 29; *Moot* v. *Business Men's Ass'n*, 157 N. Y. 201 (52 N. E. Rep. 1); *Easton* v. *Montgomery*, 90 Cal. 307 (27 Pac. Rep. 280; 25 Am. St. Rep. 128); *Espy* v. *Anderson*, 14 Pa. St. 308. Even where the contract requires the vendor to make a "good and unincumbered title," the purchaser is obliged to examine and ascertain whether the title is good and unincumbered. *Carr* v. *Roach*, 2 Duer 21. When a contract of sale of real estate specifies no time within which the examination of title is to be made, a reasonable time therefor is implied. *Easton* v. *Montgomery*, 90 Cal. 307 (27 Pac. Rep. 280; 25 Am. St. Rep. 128); *Allen* v. *Atkinson*, 21 Mich. 351. The vendee must

make all his objections to the title within a reasonable time after being furnished the abstract. He cannot make certain objections to the title as shown by the abstract, and thus induce the vendor to spend money in litigation to remove such objections, and then raise other objections which he knows the vendor cannot remove, and then insist upon a rescission of the contract on account of such objections. *Stevenson* v. *Polk*, 71 Ia. 278 (32 N. W. Rep. 340). But a waiver of one objection to the title as shown by an abstract, does not absolve the vendor from endeavoring to remove another objection, if his contract requires him to furnish an abstract showing good title. *Union Safe Deposit Co.* v. *Chisholm*, 33 Ill. App. 647. Where a contract requires all the objections to the abstract to be made within a certain time, the purchaser must be satisfied with the abstract delivered if he does not discover any defects and object therefor within the limitation. *Blackburn* v. *Smith*, 2 Exch. 783; *Morley* v. *Cook*, 2 Hare 106. If the vendor has been delinquent in furnishing the abstract, but the vendee has accepted it when furnished, the vendor can not insist upon the vendee furnishing his objections within the time specified in the contract. *Upperton* v. *Nicholson*, L. R. 6 Ch. 436.

An intending purchaser in investigating the title must examine every deed or instrument forming a part of it, especially if recorded, for he is presumed to know every fact disclosed thereby, or to which an inquiry suggested by the record would lead. *Moot* v. *Business Men's Assn.*, 157 N. Y. 201 (52 N. E. Rep. 1). But where the contract of sale required the vendor to furnish an abstract of title, and provided that if the title should be found to be unmarketable to such an extent as to warrant the purchaser in refusing the same, it was held that in determining the marketability of the title, the purchaser was justified upon relying upon the abstract furnished. If it did not disclose the marketable character of the title, he was not bound to examine further or elsewhere. *Horn* v. *Butler*, 39 Minn. 515 (40 N. W. Rep. 838); *Smith* v. *Taylor*, 82 Cal. 533 (23 Pac. Rep. 217). If the vendor at the time fixed is unable to convey a good title, the vendee may recover back the amount spent by him in investigating the title. *Uhl* v. *Loughran* (Supreme Ct.), 2 N. Y. Supp. 190; *Hewison* v.

Hoffman, (C. Pl.), 4 N. Y. Supp. 621; *Wetmore* v. *Bruce*, 118 N. Y. 319 (23 N. E. Rep. 303); *Fruhauf* v. *Bendheim*, 6 N. Y. Supp. 264. California has a statute expressly authorizing the recovery of the expense of examining the title, with interest thereon. Civ. Code, § 3306; *Turner* v. *Reynolds*, 81 Cal. 214 (22 Pac. Rep. 546). In an action against a vendor to recover the purchase money, or a deposit, because of defects in the title, the plaintiff is limited to such defects as were pointed out to the vendor by him. *Easton* v. *Montgomery*, 90 Cal. 307 (27 Pac. Rep. 280; 25 Am. St. Rep. 123); 1 Chitty on Contracts, 434; *Todd* v. *Hoggart*, M. & M. 128. In the absence of any time fixed in the agreement of sale within which the vendor shall remove defects in, or satisfy objections to, the title, a reasonable time is allowed therefor. *Easton* v. *Montgomery*, 90 Cal. 307 (27 Pac. Rep. 280; 25 Am. St. Rep. 123); *More* v. *Smedburg*, 8 Paige 600.

Sec. 17. Sufficiency of abstract between vendor and vendee. When a contract for the sale of land provides that an abstract of title is to be delivered by the vendor, the only fair interpretation of the contract is that a full abstract of title is to be furnished, which must show on its face a good title in him. *Smith* v. *Taylor*, 82 Cal. 533 (23 Pac. Rep. 217); *Constantine* v. *East*, 8 Ind. App. 291 (35 N. E. Rep. 844); *Kane* v. *Rippey*, 22 Or. 296 (23 Pac. Rep. 180); *Taylor* v. *Williams*, 2 Colo. App. 559 (31 Pac. Rep. 504); *Stevenson* v. *Polk*, 71 Ia. 278, 287 (32 N. W. Rep. 340). Under a contract for an abstract showing a good title, a vendee is entitled to demand that the abstract disclose a marketable title free from incumbrances and defects, and as to which there is no reasonable doubt. *Vought* v. *Williams*, 120 N. Y. 253 (24 N. E. Rep. 195; 17 Am. St. Rep. 634; 8 L. R A. 591); *Moot* v. *Business Men's Assn.*, 157 N. Y. 201 (52 N. E. Rep. 1); *Gates* v. *Parmley*, 93 Wis. 294 (66 N. W. Rep. 253). In such a case an abstract which fails to show whether there were judgments against or conveyances by the vendor, is insufficient, *Union Safe Dep. Co.* v. *Chisholm*, 33 Ill. App. 647; but an abstract of title furnished by a vendor of land is not insufficient because it fails to show that an acknowledgment taken in another state bore a notarial seal, when the law of such

state provides that official seal shall not be necessary to the validity of the certificate. But even though it were, the letters " L. S." in an abstract of title, following the name of a notary in a certificate of acknowledgment, sufficiently indicate that an official seal was attached to such certificate. *Burklen* v. *Hasterlik*, 155 Ill. 423 (40 N. E. Rep. 561). Upon a contract requiring the vendor to furnish an abstract showing good title in him, the vendee may rescind the contract and recover the purchase money, if the abstract so furnished fails to show a legal title. *Brown* v. *Young*, 18 Ill. App. 643. An agreement in a contract of sale of real estate that the purchase money should be returned if the title proves defective, is " pointed at incurable defects in the title, and not to such imperfections as are capable of being removed after the agreement is made, and whilst the title is under investigation." *Easton* v. *Montgomery*, 90 Cal. 307 (27 Pac. Rep. 280; 25 Am. St. Rep. 123). Where a party agreed to purchase certain real estate " on delivery of a waranty deed conveying clear title, with abstract," it was held that he could insist upon a delivery of an abstract showing clear title as a condition precedent. That upon default in furnishing such an abstract he could maintain an action for the money paid. That the defendant could not, in such an action, show as a defense that the defects in the title disclosed by the abstract did not in fact exist, or that his title to the premises was complete and perfect. *Taylor* v. *Williams*, 2 Col. App. 559, 564 (31 Pac. Rep. 504); *Smith* v. *Taylor*, 82 Cal. 533 (23 Pac. Rep. 217). The fact that the vendor can show a title by adverse possession does not change the rule. *Constantine* v. *East*, 8 Ind. App. 291 (35 N. E. Rep. 844). Where a vendor agrees to furnish his vendee " an abstract of title showing good title and power and authority to sell and convey," the deposit made by the latter to be returned and the contract to be determined in case of failure to show good title, and the abstract furnished showed good title, although in fact it was in dispute, it was held that the vendor could not rescind the contract, but would be obliged to clear the title. *Cravener* v. *Hale*, 27 Ill. App. 275. Where the abstract of title showed that the title of record came into " H. P. Hepburn," and there was no deed from him, but the next deed of record was from " H. P. Hopkins," and the

vendor claimed that the record was wrong, and that the deed purporting to be from Hopkins was in fact from Hepburn, but refused to submit his proof for examination by the purchaser or permit the deed to be recorded correctly, a good title is not shown, and the purchaser is justified in refusing to buy the land, and may claim a return of the deposit, even though it may afterwards be proven that the title was good. *Benson* v. *Shotwell*, 87 Cal. 49 (25 Pac. Rep. 249). Where a contract for the purchase of land provided that the title was to be examined by the purchaser's attorney and accepted or rejected by him, if the attorney rejects the title, the purchaser is not bound to consummate the sale, and the question whether or not the title is in fact good and marketable is not involved. *Allen* v. *Pockwitz*, 103 Cal. 85 (36 Pac. Rep. 1039); *Boulton* v. *Bethune*, 21 Grant's Ch. (U. Can.) 110. It was held in *Fitch* v. *Willard*, 73 Ill. 92, that a contract of sale requiring the vendor to furnish a satisfactory abstract of title, and give a quitclaim or special warranty deed, implies no undertaking as to the character of the title to be conveyed, but, on the contrary, shows that the vendor assumes no responsibility as to the title any further than it may have been affected by his own acts.

Sec. 18. **Ownership of abstract.** The absolute right of property in the abstract remains in the vendor until the sale is completed. Pending the sale the vendee is entitled to the custody of the abstract and has a special property therein, which he can enforce against the vendor or other persons. But immediately upon the rescission of the contract all his rights in and to the abstract cease, for, all titles being of record, he can show the defects of title as well without the abstract as with it. *Jackson* v. *Conlin*, 50 Ill. App. 538; *Espy* v. *Anderson*, 14 Pa. St. 308. Upon the completion of the sale and delivery of the deed the abstract becomes the property of the vendee as one of his muniments of title. Warvelle on Abstracts, p. 11. When, for any reason, the contract is rescinded by either party, the purchaser can not hold the abstract as a security for the return of the purchase or earnest money. *Jackson* v. *Conlin*, 50 Ill. App. 538. Where the owner of lands furnishes to a party making a loan on his land and taking a

mortgage thereon, an abstract of the title, the abstract becomes a part of the security for the loan, and the mortgagor is not entitled to it until the mortgage is paid. *Holms* v. *Wust*, 11 Abb. Pr. (N. S.), 113; Warvelle on Abstracts, p. 11.

Sec. 19. Use of abstracts as evidence—Supplying lost or destroyed records. Except where made so by statute, an abstract of title, though proved to be correct, is not evidence at all, strictly speaking, of the title or of any of the conveyances mentioned in it. *Weeks* v. *Downing*, 30 Mich. 5; *Reed* v. *Banks*, 10 U. C. C. P. 202; *People* v. *Wemple*, 67 Hun. (N. Y.), 495; *Sauers* v. *Giddings*, 90 Mich. 50 (51 N. W. Rep. 265); *Chicago & A. R. R. Co.* v. *Keegan*, 152 Ill. 418 (39 N. E. Rep. 33); *Irwin* v. *Scheuerer*, 10 Ohio C. C. 568; *Gate City Abstract Co.*, 55 Neb. 742 (76 N. W. Rep. 471). An abstract is not admissible in any case, nor is any part of it, to prove such facts as can be shown by a higher grade of evidence. *Heinsen* v. *Lamb*, 117 Ill. 549 (7 N. E. Rep. 75); *Kane* v. *Rippey*, 22 Ore. 296, 299 (23 Pac. Rep. 180; 29 Pac. Rep. 1005). Where deeds have been lost, abstracts made therefrom have been admitted as secondary evidence to prove their execution and contents, *Moulton* v. *Edmonds*, 1 De. G., F. & J., 246; and if an abstract is admitted to state the true condition of the title to lands then it may be introduced in evidence. *Garret* v. *Hanshue*, 53 O. St. 482 (42 N. E. Rep. 256; 35 L. R. A. 321). In an action on a contract for the sale of land, whereby the defendant agreed to convey a fee simple title and to furnish an abstract showing such title, the abstract tendered by the defendant may be admitted in evidence, not as proof of title to the land, but as tending to show a breach of performance of the condition of the contract requiring an abstract. *Kane* v. *Rippey*, 22 Ore. 296 and 299 (23 Pac. Rep. 180; 29 Pac. Rep. 1005). In Idaho, Nebraska, New Mexico and Utah it is provided by statute that an abstract prepared and certified by one duly authorized by the statute to engage in the business of preparing abstracts, when duly authenticated, may be admitted in evidence. Ida. Laws 1899, p. 315; Neb. Comp. Stat. (1895), § 4157; New Mex. Comp. Laws (1897), § 3934; Utah Laws 1899, p. 54. The same is provided in Wisconsin as to abstracts of records of

other counties procured by the county board of any county. Rev. Stat. (1898), § 670. Under the Nebraska statute it is held that an abstract of title may now be used in every case where the validity of a title or the existence or non-existence of liens or incumbrances are involved. The right to use an abstract as evidence is not even limited to the person to whom it was issued. If it is properly signed and certified any one possessing it may use it. *Gate City Abstract Co.* v. *Post*, 55 Neb. 742 (76 N. W. Rep. 471).

Colorado, Illinois, Mississippi and Ohio have statutes providing that where public records affecting title to real estate have been destroyed, abstracts made therefrom before such destruction which, by proceedings provided for by the statute, have been found to have been fairly made and to show a connected chain of title, or copies thereof may be purchased by the county and placed in the office of the appropriate officer, and properly certified copies thereof are made evidence as to all conveyances contained in the destroyed records, the originals of which can not be produced. Mills' Ann. Colo. Stat. (1891), §§ 3755–3756; Ill. Rev. Stat., ch. 116, §§ 13, 14; Miss. Ann. Code (1892), 2792; Bates' Ann. Ohio Stat. (1899), §§ 5389e, 5389g. The statutes of Illinois, Texas and Wisconsin provide proceedings by which the owner of a set of abstracts of destroyed records may have them adjudicated as reliable, after which they may be taken as *prima facie* evidence of all such matters as they contain. Ill. Rev. Stat., ch. 116, § 13; Sayles' Tex. Civ. Stat. (1897), art. 2313; Wis. Rev. Stat. (1898), § 661g. In Illinois and Wisconsin it is provided that where in any action involving any interest in real estate it is made to appear upon the oath of a party thereto, that any original conveyance affecting such title can not be produced by such party and the record thereof has been destroyed, an unaltered abstract of title to such property shown to have been fairly and honestly made in the ordinary course of business, shall be admissible in evidence. And the Illinois statute makes a letter press copy of such an abstract admissible. Ill. Rev. Stat. (1897), ch. 116, § 29; Wis. Rev. Stat. (1898), § 661n. The statute of Illinois to which we have referred in this section is known as the Burnt Records Act, and contains fuller provisions on this subject than any other statute in the

Union. For extensive construction of this statute see *Richley* v. *Farrell*, 69 Ills. 264; *Russell* v. *Mandel*, 73 Ill. 136; *King* v. *Worthington*, 73 Ill. 161; *Smith* v. *Stevens*, 82 Ill. 554; *Compton* v. *Randolph*, 104 Ill. 555; *Heinsen* v. *Lamb*, 117 Ill. 549 (7 N. E. Rep. 75); *Converse* v. *Wead*, 142 Ill. 132 (31 N. E. Rep. 814); *Walton* v. *Follanshe*, 165 Ill. 480 (46 N. E. Rep. 459); *Cooney* v. *A. Booth Packing Co.*, 169 Ill. 370 (48 N. E. Rep. 406).

Sec. 20. Requiring abstract of parties to real actions—Statutory provisions. In Alabama, either party to an action for the recovery of land may require the other to furnish an abstract of the title or titles on which he will rely before the trial of the action. Code (1896), § 1531. The statute of Arizona and Texas provide that "after answer filed [in action to try the title to real property], either party may by motion in writing duly served on the opposite party or his attorney of record not less than ten days before the trial of the cause, demand an abstract in writing of the claim or title to the premises in question upon which he relies." Ariz. Rev. Stat. (1887), § 3146; Sayles' Tex. Civ. Stat. (1897), Art. 5260. The statutes specify what the abstract shall contain, provide that it shall be filed with the papers and may be amended in the same manner as a pleading, "but in all cases the documentary evidence of title shall, at the trial, be confined to the matters contained in the abstract of title." Ariz. Rev. Stat. (1887), §§ 3147, 3148; Sayles' Tex. Civ. Stat. (1897), Arts. 5261-5263. California, North Dakota, South Dakota and Utah have statutory provisions exactly alike, to the effect that whenever it appears to the court that an abstract of title was necessary in an action of partition, the cost of such abstract, "with interest thereon from the time the same is subject to the inspection of the respective parties to the action, must be allowed and taxed." The plaintiff may provide the abstract before the commencement of the action, but if he fails to do so a defendant may furnish it; it may be prepared by any competent searcher of the records, but "must be verified by the affidavit of the person making it, to the effect that he believes it to be correct." The court may direct who is to have the custody of the abstract and direct the cor-

rection of any errors in it. Cal. Code Civ. Proc. (1899), §§ 799, 800; N. Dak. Rev. Code (1895), §§ 5841, 5842; S. Dak Ann. Stat. (1899), §§ 6639, 6640; Utah Rev. Stat. (1888), §§ 3569, 3570. The provision of these statutes as set forth in the first sentence above exists in Idaho. Idaho Rev. Stat (1887), § 4606.

In an application to enjoin the cutting of timber, "the petitioner" shall attach an abstract of his title, stating name of grantor and grantee, date, consideration, and description of property, names of witnesses, when and where recorded, to his petition." Ga. Code (1895), § 4927. "To the declaration for the recovery of land and *mesne* profits, the plaintiff shall annex an abstract of the title relied on for such recovery." Id., §§ 5002, 4963. The abstract is a necessary part of the declaration, but a complaint defective in this particular is amendable by adding thereto an abstract of the plaintiff's title. The object of the abstract is not to show title in the plaintiff on the face of the pleadings, but only to apprise the defendant of the nature of the title claimed, and of the specific documents which will be introduced on the trial. It is not required that the abstract shall be so clear and complete as to show a title beyond question, and the complaint is not demurrable because of defects in the abstract. *Yonn* v. *Pittman*, 82 Ga. 637 (9 S. E. Rep. 667). The plaintiff is confined to the abstract of title appended to his declaration. *Carter* v. *Greer*, 72 Ga. 897.

The court may, in all proper cases, upon motion, order abstracts of title to be furnished. Burns' Ind. Rev. Stat (1894), § 366. In an action upon a fire insurance policy, the plaintiff can not in pursuance of the above statute be required to furnish an abstract of title to the property which was burned. *Phœnix Ins. Co.* v, *Rowe*, 117 Ind. 202 (20 N. E Rep. 122). Where the action was for the possession of the land described in the complaint and to quiet title thereto, and the plaintiff had filed an abstract of title showing upon what deeds of conveyance she relied to prove such title, it was held that she was not required to furnish a more complete abstract, and a motion to require her to furnish a more specific abstract was properly overruled. *Roberts* v. *Vornholt*, 126 Ind. 511 (26 N. E. Rep. 207). When an abstract is fur-

nished pursuant to the statute, either voluntarily or by order of court, it constitutes no part of the complaint. *Roberts* v *Vornholt*, 126 Ind. 511 (26 N. E. Rep. 207); *Hoover* v *Weesner*, 147 Ind. 510 (45 N. E. Rep. 650; 46 N. E. Rep. 905). In Iowa the plaintiff in an action for the recovery or partition of real property, and the defendant, if he claim title, is required to attach to his pleading an abstract of his title giving reference to the records, and written evidence is confined to matters recited in such abstract. Code (1897), §§ 4188, 4242. In Maine in an action for the recovery of real estate the demandant or plaintiff need not state in the writ the origin of his title, or the deduction of it to himself, "but, on application of the tenant, the court may direct the demandant to file an informal statement of his title, and its origin." Rev. Stat. (1883), ch. 104, § 3. In condemnation proceedings by cities and towns, "an abstract of the title of such property, or of any parcel or parcels thereof, certified by the register or deputy register of deeds, shall also be *prima facie* evidence as to ownership, and persons having an interest in any such property, and the extent and nature of such interest." Howell's Ann. Mich. Stat. 1882, p. 1300b, § 22. Under Mississippi Code, after issue joined in ejectment, either party may require a bill of particulars of his claim or title which shall consist of a short abstract of the document ary evidences of such title, with a succinct recital of the contents of lost or destroyed instruments or the facts which will be relied on to establish title by inheritance. The court may allow amendments, but in all cases evidence of title shall be confined to the matters contained in the bill of particulars. Ann. Code (1892) § 1652. In New York, in actions for the cancellation of liens created by invalid tax sales, certified searches of title, properly verified, may be received and acted upon as evidence of the original ownership of the land sold for taxes. *People* v. *Wemple*, 67 Hun. 495.

Sec. 21. Right of abstracter to use public records—Common law principles At common law no person had a right to examine or copy the records in a public office in which he had no interest, present or prospective. *State* v. *Rachac*, 37 Minn. 372 (35 N. W. Rep. 7); *Hanson* v. *Eichstaedt*, 69

Wis. 538 (35 N. W. Rep. 30); *Scribner* v. *Chase*, 27 Ill. App. 36; *Brewer* v. *Watson*, 71 Ala. 209 (46 Am. Rep. 318); *Randolph* v. *State*, 82 Ala. 527 (2 So. Rep. 714; 60 Am. Rep. 761); *Webber* v. *Townley*, 43 Mich. 534 (5 N. W. Rep. 971; 38 Am. Rep. 213); *Bean* v. *People*, 7 Colo. 200 (2 Pac. Rep. 909); *In re McLain*, 8 Report 313; 1 Greenleaf on Ev., § 473; *McCaraher* v. *Commonwealth*, 5 Watts & S. 21 (39 Am. Dec. 106); *Ziegler* v. *Commonwealth*, 12 Pa. St. 227. This doctrine is emphatically assailed by Morse, J., without the citation of authority and in a discussion not necessary to a decision of the case, in *Burton* v. *Tuite*, 78 Mich. 363 (44 N. W. Rep. 282; 7 L. R. A. 73); and the case of *People* v. *Cornell*, 47 Barb. (N. Y.), 329, sometimes cited as being against the rule announced, is overruled in *People* v. *Cornell*, 35 How. Pr. (N. Y.), 31. By the application of the rule set forth above it has been the unanimous decision of the courts of last resort that in the absence of a statute modifying the common law, an abstracter has no right to search the records generally and to copy or abstract the entire records of a county for use in his private business. *Brewer* v. *Watson*, 71 Ala. 299 (46 Am. Rep. 318); *Randolph* v. *State*, 82 Ala. 527 (2 So. Rep. 714; 60 Am. Rep. 761); *Bean* v. *People*, 7 Colo. 200 (2 Pac. Rep. 909); *Buck* v. *Collins*, 51 Ga. 391 (21 Am. Rep. 286); *Land Title Co.* v. *Tanner*, 99 Ga. 470 (27 S. E. Rep. 727); *Scribner* v. *Chase*, 27 Ill. App. 36; *Cormack* v. *Wolcott*, 37 Kan. 391 (15 Pac. Rep. 245); *Boylan* v. *Warren*, 39 Kan. 301 (18 Pac. Rep. 174; 7 Am. St. Rep. 551); *Belt* v. *Prince George's County Abst. Co.*, 73 Md. 289 (20 Atl. Rep. 982; 10 L. R. A. 212; Ballards' Law Real Prop., Vol. II, §§ 1–3; *Webber* v. *Townley*, 43 Mich. 534 (5 N. W. Rep. 971; 38 Am. Rep. 213); *Diamond Match Co.* v. *Powers*, 51 Mich. 145 (16 N. W. Rep. 314); *Newton* v. *Fisher*, 98 N. C. 20 (3 S. E. Rep. 822); *In re Webster*, 18 U. C. C. B. 87; *Ross* v. *McLay*, 26 U. C. C. B. 190; *In re Caswell*, 18 R. I. 335 (29 Atl. Rep. 259); Mechem on Public Officers, § 739; *Barber* v. *West Jersey Title & Guaranty Co.*, 53 N. J. Eq. 158 (32 Atl. Rep. 222). The right to inspect and copy or abstract the public records is undoubted to those that have an interest therein, either present or prospective, and this right includes that of having their attorneys or agents to perform this service

for them. Warvelle on Abstracts, p. 63; Mechem on Public Officers, § 738; *State* v. *Williams*, 41 N. J. Law 332; *Brewer* v. *Watson*, 71 Ala. 299 (46 Am. Rep. 318); *Randolph* v. *State*, 82 Ala. 527 (2 So. Rep. 714; 60 Am. Rep. 761); *Daly* v. *Dimock*, 55 Conn. 579 (12 Atl. Rep. 405); *People* v. *Walker*, 9 Mich. 328; *Rex* v. *Merchant's Tailor Co.*, 2 B. & Ad. 115 (22 E. C. L. 40). When specially employed in a certain case by one having such an interest in the records as would give him the right to examine them, the right of individuals or corporations, engaged in the business of making abstracts, to have access to the records for the purpose of performing that particular service, such as preparing an abstract of a specified title, can not be denied. *Boylan* v. *Warren*, 39 Kan. 301 (18 Pac. Rep. 174; 7 Am. St. Rep. 551); *Brewer* v. *Watson*, 61 Ala. 310; *Brewer* v. *Watson*, 71 Ala. 299 (46 Am. Rep. 318); *Randolph* v. *State*, 82 Ala. 527 (2 So. Rep. 714; 60 Am. Rep. 761); *Barber* v. *West Jersey Title & Guaranty Co.*, 53 N. J. Eq. 158 (32 Atl. Rep. 222); Mechem on Public Officers, § 738.

It has been argued in a large number of cases that as the records are public, every person has a right to inspect, examine and copy them, at all reasonable times and in a proper way; that ministerial officers charged with the custody of books and records can not deny access to their offices or the books therein contained to any person coming there at a proper time and in a proper manner, and that any person so desiring has a right to examine such books and records without charge, not as a privilege or favor, but as a matter of right. *Phelan* v. *State*, 76 Ala. 49; *Lum* v. *McCarty*, 39 N. J. Law 287; *Burton* v. *Tuite*, 78 Mich. 363 (44 N. W. Rep. 282; 7 L. R. A. 73); *People* v. *Richards*, 99 N. Y. 620 (1 N. E. Rep. 258); *People* v. *Cornell*, 47 Barb. 329; *People* v. *Reilly*, 38 Hun. 429; *Townshend* v. *Register*, 7 How. Pr. 318; *Johnson* v. *County of Wakulla*, 28 Fla. 720, 733 (9 So. Rep. 690); *State* v. *Leach*, 60 Me. 58 (11 Am. Rep. 172); *Newton* v. *Fisher*, 98 N. C. 20 (3 S. E. Rep. 822); *Hunter* v. *Windsor*, 24 Vt. 327; *Nash* v. *Lathrop*, 142 Mass. 29 (6 N. E. Rep. 559); *Daly* v. *Dimock*, 55 Conn. 579, 588; *Parsons* v. *Randolph*, 21 Mo. App. 353.

Sec. 22. Right of abstracter to use public records—Statutory provisions. The strict rule of the common law requiring one to have an interest in the contents of a public record before he can claim the right to examine it has been modified in nearly all the states by statutes giving every person the right to examine public records, whether interested therein or not, subject to reasonable regulations. See U. S. Rev. Stat., § 828; Supp. to U. S. Stat., p. 602; Ala. Code (1896), §§ 985, 988, 3367 (Laws 1889, p. 78); Ariz. Rev. Stat. (1887), § 554; Cal. Pol. Code, § 4246; Mills' Ann. Colo. Stat. (1891), § 980; Comp. Stat. D. C. (1894), ch. 58, § 87; Fla. Rev. Stat. (1892), § 1891; Ga. Code (1895), §§ 14, 2778; Ida. Rev. Stat. (1887), § 2085; Myers' Ill. Rev. Stat. (1897), ch. 115, § 19a; Webb's Kan. Gen. Stat. (1897), ch. 27, § 165; Wolff's La. Rev. Stat. (1897), § 3082; Me. Rev. Stat. (1883), ch. 78, § 28; *State* v. *Leach*, 60 Me. 58 (11 Am. Rep. 172); Poe's Md. Supp., p. 11, Art. 10, § 9, and Laws 1899, p. 647, giving attorneys or their authorized representatives the right to examine the records in the office of the clerk of a court; Mass. Pub. Stat. (1882), ch. 87, § 18; Howell's Supp. Mich. Stat., 787k; Laws 1889, Act No. 205; *Aitcheson* v. *Huebner*, 90 Mich. 648 (51 N. W. Rep. 684); Minn. Rev. Stat. (1894), § 765; Mont. Code Civ. Proc. (1895), § 3180; Pol. Code, §§ 1136, 4423; Neb. Comp. Stat. (1895), § 4170; *State* v. *Meeker*, 19 Neb. 108 (26 N. W. Rep. 620); N. H. Pub. Stat. (1891), ch 43, § 45; N. J. Gen. Stat. (1895), pp. 857, § 25; 2105, § 17; 99, § 5; 1980, § 2; 1842, § 10. Birdseye's N. Y. Rev. Stat. (1896), pp. 1114, §§ 99, 102; 1743, § 49; 3068, § 28; 3157, § 264a. Bates' Ann. Ohio Stat. (1899), § 1153a; Pepper & Lewis' Penn. Dig., p. 4686, §§ 3 and 4; Utah Rev. Stat. (1898), §§ 632, 3375; Vt. Rev. Stat. (1894), § 3009; *Hunter* v. *Windsor*, 24 Vt. 327; *Lyman* v. *Windsor*, 24 Vt. 580; *Lyman* v. *Edgarton*, 29 Vt. 305; Va. Rev. Code (1887), § 3179; Ballinger's Wash. Codes (1897), § 420; W. Va. Code (1891), ch. 117, § 5; *State* v. *Long*, 37 W. Va. 266 (16 S. E. Rep. 578); Sanborn & Berryman's Ann. Wis. Stat. (1898), § 700.

A statute conferring the right of inspection and examination by persons not interested must be clear and it will not be extended by construction, *Webber* v. *Townley*, 43 Mich. 534

(5 N. W. Rep. 971; 38 Am. Rep. 213); *Barber* v. *West Jersey Title and Guaranty Co.*, 53 N. J. Eq. 158 (32 Atl. Rep. 222); but persons engaged in the preparation or examination of an abstract may claim the benefit of such a statute. *Lum* v. *McCarty*, 39 N. J. Law, 287; *Burton* v. *Tuite*, 78 Mich. 363 (44 N. W. Rep. 282; 7 L. R. A. 73); *People* v. *Richards*, 99 N. Y. 620 (1 N. E. Rep. 258). However, they can not claim the right to abstract the entire records of an office for the purpose of making a set of abstract books for private use or speculation, under a statute simply granting the right of inspection to all persons. *Cormack* v. *Walcott*, 37 Kan. 391 (15 Pac. Rep. 245); *Boylan* v. *Warren*, 39 Kan. 301 (18 Pac. Rep. 174; 7 Am. St. Rep. 551); *Bean* v. *People*, 7 Colo. 202 (2 Pac. Rep. 909); *Randolph* v. *State*, 82 Ala. 527 (2 So. Rep. 714; 60 Am. Rep. 761); *Buck & Spencer* v. *Collins*, 51 Ga. 391 (21 Am. Rep. 236); *Land Title Warranty Co.* v. *Tanner*, 99 Ga. 470 (27 S. E. Rep. 727). A few of the statutes collated above contain special provisions concerning the rights of abstract makers, and some of them have been construed by the courts. Under the Federal statutes it was decided that a person, company or corporation engaged in the business of preparing abstracts, or of guaranteeing titles, as well as any private citizen, has the right to examine, without charge, the judgment dockets, and indexes and cross-indexes thereof, in the offices of the clerks of the United States courts. *In re Chambers*, 44 Fed. 786; *Commonwealth Title Ins. Co.* v. *Bell*, 87 Fed. 19. The statute of Colorado was amended by the next session of the legislature after the decision in the case of *Bean* v. *People*, 7 Colo. 202 (2 Pac. Rep. 909), cited above, so as to provide that "any person or corporation engaged in making abstracts or abstract books, and their employees shall have the right, during usual business hours, to inspect and make memoranda or copies of the contents of all such books and papers, for the purposes of their business; but any such officer may make reasonable and general regulations concerning the inspection of such books and papers by the public;" and in the case of *Stockman* v. *Brooks*, 17 Colo. 248 (29 Pac. Rep. 746), the supreme court recognizes that this amendment was undoubtedly adopted to give abstracters the privilege denied them in the case of *Bean* v.

People. The Illinois statute provides that "all persons shall have the right to take memoranda and abstracts" of the public records, "without fee or reward;" and prior to the statute it was held that persons engaged in the business of making abstracts of title were not entitled to have access to the original instruments and books of record in the recorder's office, to make abstracts thereof for the purposes of their business. *Scribner* v. *Chase*, 27 Ill. App. 86. At the first session of the Kansas legislature after the rendition of the decisions in the cases of *Cormack* v. *Walcott*, 37 Kan. 391 (15 Pac. Rep. 245); *Boylan* v. *Warren*, 39 Kan. 301 (18 Pac. Rep. 174; 7 Am. St. Rep. 551), referred to above, a statute was enacted providing for the giving of bond by abstracters, after which they should "have free access to the county records of the several county offices for the prosecution of their business of abstracting," and it was made a misdemeanor for any county officer to prevent any such bonded abstracter from a proper use of the records of his office. Laws 1889, ch. 1; Webb's Gen. Stat. (1897), ch. 117, §§ 35–39. See Compilation of Statutory provisions given below. The Michigan statute provides that "the officers having the custody of any county, city or town records in this state shall furnish proper and reasonable facilities for the inspection and examination of the records and files in their respective offices, and for making memoranda and transcripts therefrom, during the usual business hours, to all persons having occasion to make examination of them for any lawful purpose;" and under this statute it is held that, subject to reasonable rules and regulations, one may claim the right to use the public records for the purpose of preparing a set of abstract books therefrom. *Burton* v. *Tuite*, 78 Mich. 363 (44 N. W. Rep. 282; 7 L. R. A. 73); 80 Mich. 218 (45 N. W. Rep. 88); *Day* v. *Button*, 96 Mich. 600 (56 N. W. Rep. 8). The Minnesota statute opens the records "to the inspection of any person demanding the same, either for examination, or for the purpose of making or completing an abstract or transcript therefrom." The Washington statute gives the right to "any and all persons, during reasonable office hours, to inspect, examine and search any and all records * * * and to gather any information therefrom, and to make any desired notes or memoranda about or concerning

the same, and to prepare an abstract or abstracts of title to any and all property therein contained." And the statute of Wisconsin provides that "every sheriff, clerk of the circuit court, register of deeds, county treasurer, register of probate and county clerk shall keep his office open during the usual business hours each day, Sundays and legal holidays excepted, and with proper care shall open to the examination of any person all books and papers required to be kept in his office, and permit any person so examining to take notes and copies of such books, records or papers, or minutes therefrom." Under the Minnesota and Wisconsin statutes it is held that an abstracter may use the public records for the purpose of preparing a set of abstract books for his own use. *State ex rel. Cole* v. *Rachac*, 37 Minn. 372 (35 N. W. Rep. 7); *Hanson* v. *Eichstadt*, 69 Wis. 538 (35 N. W. Rep. 30). Under the statute of Oregon, only the clerk, an attorney or some one who appears of record to be a party in interest can search the records of the circuit and county courts, but the clerk is required to furnish certified abstracts of such records upon request. Hill's Ann. Laws (1887), § 579.

Sec. 23. Power of officer to regulate the use of records—Charging fees. Even where the right of all persons, including abstracters, to search the public records generally in the preparation of abstracts, is conferred by statute, the custodian has a right to make such reasonable regulations as to the time and manner in which the books shall be examined and copies taken, as he may deem necessary to the safety of the records and orderly administration of the affairs of his office. *Randolph* v. *State*, 82 Ala. 527 (2 So. Rep. 714; 60 Am. Rep. 761); *People* v. *Richards*, 99 N. Y. 620 (1 N. E. Rep. 258); *People* v. *Reilly*, 38 Hun. 429; *State* v. *Rachac*, 37 Minn. 373 (35 N. W. Rep. 7); *Nash* v. *Lathrop*, 142 Mass. 29 (6 N. E. Rep. 559); *Hanson* v. *Eichstaedt*, 69 Wis. 538 (35 N. W. Rep. 30); *Lum* v. *McCarty*, 39 N. J. Law 287; *Stockman* v. *Brooks*, 17 Colo. 248 (29 Pac Rep. 746); *Upton* v. *Catlin*, 17 Colo. 546 (31 Pac. Rep. 172; 17 L. R. A. 282). In *Belt* v. *Prince George's County Abstract Company*, 73 Md. 289 (20 Atl. Rep. 982; Ballards' Law Real Prop., Vol. II, §§ 1–3), it was stated to be the opinion of the court that it would

be a breach of duty, on the part of the clerk, to permit any one to examine and make searches of the records in his office, unless it is under the supervision of himself, or one of his deputies. The same declaration was made in *Cormack* v. *Wolcott*, 37 Kan. 391 (15 Pac. Rep. 255); *Upton* v. *Catlin*, 17 Colo. 546 (31 Pac. Rep. 172; 17 L. R. A. 282); *Buck* v. *Collins*, 51 Ga. 391 (21 Am. Rep. 236). The officer may limit the number of persons employed by one abstracter in examining the records, or the number of hours they may occupy the office each day. *People* v. *Richards*, 99 N. Y. 620 (1 N. E. Rep. 258); *Upton* v. *Catlin*, 17 Colo. 546 (31 Pac. Rep. 172; 17 L. R. A. 282). An abstracter must not obstruct the officers in charge in the performance of their official duties, by withholding records from them when needed for the performance of an official function. *Randolph* v. *State*, 82 Ala. 527 (2 So. Rep. 714; 60 Am. Rep. 761). A person seeking access to public records must conduct himself in a civil and orderly manner, or he may properly be denied access thereto. *People* v. *Reiley*, 38 Hun. 429; *Boyden* v. *Burke*, 14 How. (U. S.) 575. But the inspection of public documents can not be denied merely on the ground that the party applying for it has been guilty of some past impropriety of conduct as to a matter to which such documents may refer, nor because it is apprehended that the information obtained will be used in litigation against the county or state, or the custodian of the records. *Brewer* v. *Watson*, 71 Ala. 299 (46 Am. Rep. 318); *Boyden* v. *Burke*, 14 How. (U. S.) 575. A contract between the custodian of public records and an abstract company, by which the custodian is to grant such abstract company exclusive right to search the records is contrary to public policy and void. *Parsons* v. *Randolph*, 21 Mo. App. 353. A corporation organized for the purpose of examining and guaranteeing titles has the same rights as to the examination of public records as an individual. *Barber* v. *West Jersey Title & Guaranty Co.*, 53 N. J. E. 158 (32 Atl. Rep. 222).

A statute specially authorizing a corporation to "make and procure copies and abstracts from the public records of the state," does not entitle such corporation to search the records and make abstracts or copies thereof, without payment of the lawful fees to the clerk who is required by statute to

"have the custody of the books and papers pertaining to his office, and shall carefully keep and preserve the same * * * and he shall give a copy of any paper or record in his office to any person applying for the same, upon being paid the usual fees for transcribing such paper or record." *Belt* v. *Prince George's Co. Abst. Co.*, 78 Md. 289 (20 Atl. Rep. 982; 10 L. R. A. 212; Ballards' Law Real Prop., Vol II, §§ 1–3). The principle that the right of inspection can not be exercised so as to deprive an officer of his statutory fees for copies of records in his custody is recognized in the case of *Newton* v. *Fisher*, 98 N. C. 20 (3 S. E. Rep. 822). But ordinarily if a person dispenses with the services of the custodian of the records, and makes the examination himself, no fee can be charged. *State* v. *Long*, 37 W. Va. 266 (16 S. E. Rep. 578); *Lum* v. *McCarty*, 39 N. J. L. 287; *In re Chambers*, 44 Fed. Rep. 786. A recent statute of Tennessee provides that "all laws requiring the payment of a fee for the search of any public record or records in this state be, and the same are hereby repealed." Acts 1899, p. 768, ch. 328.

STATUTORY PROVISIONS.

[Below we give a compilation of such statutory provisions as have been enacted by the several states, regulating the preparation and furnishing of abstracts of title, and prescribing the duties and liabilities of persons engaged in that work.]

Sec. 24. Alabama. "It shall be unlawful for any person to make or certify to a false and fraudulent abstract of title to lands in this state, in and by which the true condition of the records is falsely and fraudulently represented," and the punishment may be a heavy fine or imprisonment, or both. Laws 1899, p. 19. Abstracters are required to pay a license tax. Laws 1899, p. 172.

Sec. 25. Arizona. "The recorder must, upon the application of any person, and upon the payment or tender of the fees therefor, make searches for conveyances, mortgages, and all other instruments, papers, or notices recorded or filed in his office, and furnish a certificate thereof, stating the names of the parties to such instruments, papers, and notices, the dates thereof, the year, month, day, hour, and minute they were recorded or filed, the extent to which they purport to affect the property to which they relate, and the book and pages where they are recorded." Rev. Stat. (1887), § 551.

"If any recorder neglects or refuses to make the searches and to give the certificate required by this chapter, or if such searches or certificate are incomplete and defective in any important particular affect-

ing the property in respect to which the search is requested, he is liable to the party aggrieved for three times the amount of damages which may be occasioned by such neglect or refusal, or by such incompleteness or defect in the searches and certificate, and an action may be brought on his official bond by the party aggrieved." Rev. Stat. (1887), § 552.

Sec. 26. California. "The recorder must, upon the application of any person, and upon the payment or tender of the fees therefor, make searches for conveyances, mortgages, and all other instruments, papers, or notices recorded or filed in his office, and furnish a certificate thereof, stating the names of the parties to such instruments, papers, and notices, the dates thereof, the year, month, day, hour and minute they were recorded or filed, the extent to which they purport to affect the property to which they relate, and the book and pages where they are recorded." Pol. Code (1899), § 4243.

"If any recorder neglects or refuses to make the searches and to give the certificate required by this article, or if such searches or certificate are incomplete and defective in any important particular affecting the property in respect to which the search is requested, he is liable to the party aggrieved for three times the amount of the damages which may be occasioned thereby." Pol. Code (1899), § 4244.

Sec. 27. Colorado. "It shall be the duty of the several county clerks and recorders in this state to make and furnish upon application therefor, abstracts of deeds, powers of attorney, mortgages, releases and all other instruments and muniments of title to real property recorded in their respective counties, which abstract shall set forth a description of the property, the character of the instrument, and date of the execution and acknowledgment, the names of parties to the instrument, the date of record and the page and volume of the record book wherein such instrument is recorded, and such abstract shall be made and furnished by said clerks and recorders to any person who shall make application therefor, and shall pay or tender the fees provided by law, and such abstracts shall be certified by said clerks and recorders under the seal of their offices as correct from what appears of record in their office." Mill's Ann. Stat. (1891), § 839.

Sec. 28. Idaho. "The recorder must, upon the application of any person, and upon the payment or tender of the fees therefor, make searches for conveyances, mortgages and all other instruments, papers or notices recorded or filed in his office, and furnish a certificate thereof, stating the names of the parties to such instruments, papers and notices, the dates thereof, the year, month, day, hour and minute they were filed, the extent to which they purport to affect the property to which they relate, and the book and pages where they are recorded." Rev. Stat. (1887), § 2032.

"If any recorder neglects or refuses to make the searches and to give the certificate required by this chapter; or if such searches or certificate are incomplete and defective in any important particular affecting

the property in respect to which the search is requested, he is liable to the party aggrieved for three times the amount of the damages which may be occasioned thereby." Rev. Stat. (1887), § 2033.

"It shall be a misdemeanor for any person or persons to engage in the business of compiling abstracts of title to real estate, in the State of Idaho, and demand and receive pay for the same, without first filing in the office of the probate judge of the county in which such business is conducted, a bond to the State of Idaho, in the penal sum of ten thousand dollars, with not less than three sureties, residents of the county, conditioned for the payment by such abstracters of any and all damages that may accrue to any party or parties, by reason of any error, deficiency or mistake in any abstract or certificate of title, made and issued by such person or persons." Laws 1899, p. 456.

"The probate judge shall be provided with a suitable register, for entering and registering the names of all abstracters, who qualify, and receive a certificate, and shall be entitled to a fee of two dollars for each and every certificate so issued." Laws 1899, p. 314, § 2.

"When any abstracter shall have duly filed his bond as above provided, he shall be entitled to receive a certificate from such probate judge, that said bond has been by him duly approved, and filed for record, which certificate shall be valid so long as such abstracter shall maintain his surety upon the bonds as herein provided for unimpaired, and the possession of such valid certificate at the date of issuance of any abstract shall entitle such abstract of title to real estate, certified to and issued by such abstracter to be received in all courts as *prima facie* evidence of the existence of the record of deeds, mortgages and other instruments, conveyances or liens affecting real estate, mentioned in such abstract and that such record is as described in said abstract of title." Laws 1899, p. 315, § 3.

"Any party to a civil action who may desire to use in evidence at the trial thereof any abstract of title to real estate as herein provided, shall furnish to the opposing party or his attorneys a copy of such abstract at least three days before the trial of said action, and in case such real estate be not in the county where such trial is to take place, then such copy shall be furnished to the opposing party or his attorney, to allow a sufficient number of days [for] such opposing party to proceed by the usual route of travel, to the county seat of a county where such real estate may be situated and return to the place of trial in addition to the three days for preparation above provided for." Laws 1899, p. 315, § 4.

"The bond herein provided for may run during the continuance of said person or persons in said abstract business, not to exceed five years, and the probate judge of the county where the bond herein provided for, may be filed, may, at any time upon complaint of any owner of real estate in his county, require such abstracter, upon ten days' notice to give additional security upon said bond, and show cause why the same should not be declared invalid, and the certificate thereof recalled, and annulled, and if within such time, the additional security to be approved

by said probate judge be not furnished, and no sufficient reason to show to the judge why the same should not be required, the said bond shall be declared invalid, and the certificate thereof recalled and cancelled." Laws 1899, p. 315, § 5.

"The abstracter or complainant may have an appeal to the district court from such decision of the probate judge by preserving the evidence taken at the hearing which shall be certified up by such judge, and such appeal shall be summarily decided by the court upon such evidence, and the cost of such appeal, including the furnishing of such evidence, shall be adjudged against the defeated party." Laws 1899, p. 315, § 6.

Section 29. Illinois. "In all counties where a recorder of deeds is elected, in which said recorder of deeds has heretofore been, or shall hereafter be required by the county board to keep abstract books showing by tracts every conveyance or incumbrance recorded, the date of the instrument, the time of filing the same, the book and page where the same is recorded, and showing a true chain of title to each tract and the incumbrances thereon, as shown by the records of his office, such recorder shall, and he is hereby authorized, to keep judgment dockets and indexes thereto, showing all judicial proceedings affecting title to real estate in such county, tax sale books with indexes thereto, showing sales or forfeitures of all lands in the county for unpaid taxes and assessments, and such other books as are usual or necessary to be kept for the purpose of making complete abstracts of title to real estate; and the county board shall furnish such recorder with the necessary rooms, books, stationery, fuel and lights for the purposes herein set forth. *Provided*, that nothing in this act shall be construed to empower the recorder to prevent the public from examining and taking memoranda from all the records and instruments filed for record, indexes and other books in his official custody, but it shall be his duty at all times, when his office is or is required by law to be open, to allow all persons without fee or reward to examine and take memoranda from the same." Myers' Rev. Stat. (1897), ch. 115, § 22.

"Every recorder of deeds keeping such books is hereby authorized, and it shall be his duty, to make and certify under the seal of his office, for all persons desiring the same, abstracts of title to real estate in his county." Myers' Rev. Stat. (1897), ch. 115, § 23.

"Every such recorder shall, before making and certifying any such abstracts of title, give a bond with sufficient security, to be approved by the judge of the county court, payable to the people of the State of Illinois, in the penal sum of twenty thousand dollars ($20,000), conditioned to secure the accuracy and correctness of any and all such abstracts of title, and to indemnify any and all persons purchasing such abstracts from such recorder, for all actual losses or damages which they may sustain by reason of any errors, mistakes or omissions in any such abstracts of title, which bond shall be filed in the office of the secretary of state, and a copy thereof entered upon the records of the county court." Myers' Rev. Stat. (1897), ch. 115, § 24.

It is not the duty of the recorder of deeds to examine his records and give information as to the legal effect of the conveyances of record in his office, but he is bound to search the records of his office, and give information as to whether there are on record deeds, mortgages or other writings concerning lands, and refer the party to them, so that he may be enabled to judge, for himself, or take counsel, as to the manner in which the title is affected, or the estate encumbered by them. If he gives incorrect information he is guilty of a breach of his official duty, for which an action may be maintained on his official bond. *Lusk* v. *Carlin*, 5 Ill. 395. In *Brockway* v. *Cook County*, 15 Ill. App. 560, the court held that the abstract book to be kept by county recorders was to be open to the inspection and examination of any one, like the record of deeds and the judicial records of the different courts.

Sec. 30. Kansas. "It shall be unlawful for any person, firm or corporation to engage in the business of abstracting or make abstracts of title to real estate in any of the counties of the state of Kansas, without first having executed and filed with the county clerk of the county in which said person, firm or corporation intends to engage in the business of abstracting, a bond, to be approved by the board of county commissioners of said county, with three or more good and sufficient sureties, in the penal sum of five thousand dollars, conditioned that they will properly demean themselves in the business of abstracting, and will in no way mutilate, deface or destroy any of the records of the several county offices to which they may have access, and that they will not in any way interfere with, hinder or delay the several county officers in the discharge of their duties while using said records in the prosecution of said business of abstracting, provided, however, that the records shall in no case be taken from the county office to which they belong." Webb's Gen. Stat. (1897), ch. 117, § 35.

"The person, firm or corporation who shall execute and file said bond of five thousand dollars for said purpose shall be liable on said bond, *first*, to the State of Kansas; *second*, to any person who shall be in any way damaged by any mutilation, injury or destruction of any record or records of the several county offices to which he or they may have access, to the amount of damage actually done said person, and *third*, said person, firm or corporation shall be liable on said bond to any person or persons for whom he or they may compile, make or furnish abstracts of title, to the amount of damage done to said person or persons by any incompleteness, imperfection or error made by said person, firm or corporation in compiling said abstract. And the filing of said bond shall be a guaranty of the good faith and responsibility of said person, firm or corporation engaged in said business of abstracting." Webb's Gen. Stat. (1897), ch. 117, § 36.

"Upon the execution and filing of the bond hereinbefore mentioned each person, firm or corporation so filing such bond shall have free access to the county records of the several county offices for the purpose of the prosecution of their said business of abstracting, and the compiling,

posting and keeping up of their abstract-books necessary for the proper conduct of their said business, under the direct supervision of the county officers having the legal custody of said records, and while handling and using said county records for any of the purposes of this act, the said abstracters shall be under the same obligation to protect and carefully keep and preserve said records as the several county officers who have the legal custody of said records, and subject to the same penalties for a violation of such duty as said officer would be." Webb's Gen. Stat. (1897), ch. 117, § 37.

"Any person, firm or corporation who shall engage in the business of abstracting, or making abstracts of title for any one except on their own property, or as a legally constituted attorney for another person, without first having executed and filed the bond in compliance with section one of this act (§ 35 of this chapter), shall be refused the use of the records by the officer having the custody thereof, and shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not exceeding one hundred dollars for each and every such offense." Webb's Gen. Stat. (1897), ch. 117, § 38.

"Any county officer who shall prevent or prohibit any person who has complied with the provisions of this act from a proper use of the records of his said office as hereinbefore provided shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not exceeding one hundred dollars for each and every such offense." Webb's Gen. Stat. (1897), ch. 117, § 39.

Laws of 1899 have an act applying to Sheridan county only, prescribing the fees that abstracters may charge in that county, and requiring them to prepare abstracts when requested, making it a misdemeanor to refuse, and directing the custodian of the records to refuse the use thereof to any one violating the provisions of the statute. Laws 1899, p. 217.

It is no part of the official duty of a clerk of the district court to make searches of the records in his office for judgments, liens, or suits pending, affecting the title to real property and certify to the result of such search. *Mallory* v. *Ferguson*, 50 Kan. 685 (32 Pac. Rep. 410; 22 L. R. A. 99).

Sec. 31. Minnesota. "The register of deeds shall make out, under his certificate and seal, and deliver to any person requesting the same, a full and perfect abstract of the title to any real estate, together with all incumbrances, liens and instruments, in any manner affecting such title as the same appears of record or on file in his office, on being paid his lawful fees therefor. *Provided*, however, that nothing herein shall apply to or be applicable to the register of deeds of Ramsey County." Rev. Stat. (1894), § 773.

"The register shall exhibit free of charge, during the hours that his office is, or is required by law to be, open, any of the records or papers in his official custody, to the inspection of any person demanding the same, either for examination, or for the purpose of making or complet-

ing an abstract or transcript therefrom; *provided*, that whenever, in the opinion of the board of county commissioners, it is for the benefit of the the people of their county, that any person, company, or corporation, who has or may have a set of abstracts of title, should be permitted to occupy any part of the county building for an office, such board may, by resolution, give such person, company, or corporation permission so to do. And in every such case such board shall require of such person, company, or corporation a bond in a sum not less than five hundred dollars nor more than five thousand dollars, with two or more sureties, to be approved by the commissioners, conditioned that such person, company, or corporation will handle all public records belonging to the county with due care, and will not charge any greater fee for making abstracts than is or may be allowed the register of deeds for like services, and for the faithful performance of his duty as an abstracter, *provided, further*, that nothing contained in this act shall be construed as giving any person the right to have or use the said records for the purpose of making or completing an abstract or transcript therefrom when it would interfere or hinder the register of deeds in the performance of his official duties, or permitting any person to take any of said records from the register of deeds' office without his consent. Rev. Stat. (1894), § 765.

"Whenever information as to the contents of any of said books respecting the existence or docketing or satisfaction of judgments is required for the purpose of making or certifying abstracts of title, any person requiring such information shall apply to the clerk therefor. And said clerk shall at once make search, and certify the result of such search, under his hand and the seal of said court, giving the name of the party against whom any judgment appears of record, the amount of such judgment, and the time of its entry, and of its satisfaction, [if satisfied,] and, if requested, any other entries relative to such judgments as they appear of record; *provided*, that this act shall not prevent attorneys or other persons from having reasonable access to and from examining such records when no such certificate is necessary or required." Rev. Stat. (1894), § 861.

Sec. 32. Mississippi. The board of supervisors of any county may, when in its opinion, the interest of the county would be subserved thereby, procure by purchase or have made a complete abstract of titles to land in the county and may provide all books necessary for the purpose, and the costs thereof shall be paid out of the county treasury. Such abstracts, when purchased or made, shall be kept in the office of the chancery clerk of the county as a public record. Ann. Code (1892), § 301, as amended, Laws 1898, ch. 37, p. 59.

Sec. 33. Montana. "The county clerk may, upon the application of any person, and upon the payment or tender of fees therefor, make searches for conveyances, mortgages and all other instruments, papers or notices recorded or filed in his office, and furnish a certificate thereof, stating the names of the parties to such instruments, papers and

notices, the dates thereof, the year, month, day, hour and minute they were recorded or filed, the extent to which they purport to effect the property to which they relate, and the book and pages where they are recorded." Pol. Code (1895), § 4420.

"If any county clerk as ex-officio recorder neglects or refuses to make the searches and to give the certificates required by this article; or if such searches or certificates are incomplete or defective, when such incompleteness or defect is due to his direct responsibility particularly affecting the property in respect to which it was requested, he is liable to the party aggrieved for three times the amount of the damages which may be occasioned thereby, and is punishable as provided in the penal code" Pol. Code (1895), § 4421.

Sec. 34. Nebraska. "It shall be unlawful for any person or persons to engage in the business of compiling abstracts of titles to real estate in the State of Nebraska and demand and receive pay for the same without first filing in the office of the county judge of the county in which such business is conducted a bond to the State of Nebraska in the penal sum of ten thousand dollars ($10,000), with not less than three sureties, residents of the county, to be approved by such county judge, conditioned for the payment by such abstracters of any and all damages that may accrue to any party or parties by reason of any error, deficiency, or mistake in any abstract or certificate of title made and issued by such person or persons." Comp. Stat. (1895), § 4156.

"When any abstracter shall have duly filed his bond as above provided he shall be entitled to receive a certificate from such county judge that said bond has been by him duly approved and filed for record, which certificate shall be valid so long as such abstracter shall maintain his surety upon the bonds as herein provided for, unimpaired, and the possession of such valid certificate, at the date of issuance of any abstract, shall entitle such abstract of title to real estate, certified to and issued by such abstracter, to be received in all courts as *prima facie* evidence of the existence of the record of deeds, mortgages, and other instruments, conveyances, or liens affecting the real estate mentioned in such abstract, and that such record is as described in said abstract of title." Comp. Stat. (1895), § 4157.

"Any party to a civil action who may desire to use in evidence at the trial thereof any abstract of title to real estate as herein provided shall furnish to the opposing party or his attorney a copy of such abstract at least three days before the trial of said action; and in case such real estate be not in the county where such trial is to take place, then such copy shall be so furnished to the opposing party or his attorney, to allow a sufficient number of days, such opposing party to proceed by the usual route of travel to the county seat of the county where such real estate may be situated and return to the place of trial, in addition to the three days for preparation above provided for." Comp. Stat. (1895), § 4158.

"The bond herein provided for may run during the continuance of said person or persons in said abstract business not to exceed five years

and the county judge of the county where the bond herein provided for may be filed, may at any time on complaint of any owner of real estate in his county require such abstracter upon ten days' notice to give additional security upon said bond, and show cause why the same should not be declared invalid and the certificate thereof recalled and anulled; and if within such time the additional security to be approved by said county judge be not furnished, and no sufficient reason be shown to the judge why the same should not be required, then said bond shall be declared invalid, and the certificate thereof recalled and annulled." Comp. Stat. (1895), § 4159.

"The abstracter or complainant may have an appeal to the district court from such decision of the judge by preserving the evidence, taken at the hearing, which shall be certified up by such judge and such appeal shall be summarily decided by the court upon such evidence, and the cost of such appeal including the furnishing of said evidence shall be adjudged against the defeated party." Comp. Stat. (1895), § 4160.

This statute was intended to extend the liability of abstracters beyond the limits fixed at common law, and one who purchases real estate on the faith of a certificate of title furnished to his vendor by a bonded abstracter may maintain an action for damages if the certificate proves false. *Gate City Abst. Co.* v. *Post*, 55 Neb. 742 (76 N. W. Rep. 471). One suffering damages on account of a false abstract may maintain an action against the abstracter although he sustains no contractual relations with him. *Thomas* v. *Carson*, 46 Neb. 765 (65 N. W. Rep. 899). The relation between an abstracter and his employer remains as it was before the statute, purely contractual, the only difference being that the bond of the former is a guaranty of his skill, faithfulness and fidelity, and the abstracter may still limit his liability by his contract and certificate to the same extent as before the enactment of the statute. And where an abstracter states in the certificate to the abstract that he has examined only certain records, the fact that a mortgage which is recorded in other records is omitted by a conspiracy between the abstracter, the mortgagee and a holder of a subsequent mortgage, will not make the abstracter liable on his bond for such omission to a person purchasing such subsequent mortgage and relying upon such certificate. *Thomas* v. *Carson*, 46 Neb. 765 (65 N. W. Rep. 899).

Sec. 35. New Jersey. "The clerk of the court of common pleas of the county shall record, in large, well-bound books of good paper, to be provided for that purpose, and carefully preserved, all deeds and conveyances of lands, tenements and hereditaments, lying and being in the said county acknowledged or proved, and certified to have been acknowledged or proved in manner aforesaid, which shall be delivered to him to be recorded; and, also, all other instruments which are, by this act directed therein to be recorded, to which books every person shall have access at proper seasons, and be entitled to transcripts from the same, on paying the fees allowed by law." Gen. Stat. (1895), p. 857, § 25.

The clerk, when called upon to make a search for title, is entitled

to have such information either by the names of the parties or by reference to the records in his office, as will enable him, by examining the indices or the record to which he is referred, to ascertain the premises in relation to which he is required to make a search. A party desiring a search can not carve out a description of lands at his will, and require the services of the clerk to ascertain the condition of the title. Under a call for a search by such a description, the clerk is not required to certify that he can find no deeds on record conveying the premises described. *State ex rel* v. *Deacon*, 44 N. J. Law 559.

Sec. 36. New York. "A surrogate, county clerk, register clerk of a court, or other person, having the custody of the records or other papers in a public office, within the state, must, upon request, and upon the payment of, or offer to pay, the fees allowed by law; or, if no fees are expressly allowed by law, fees at the rate allowed to a county, clerk for a similar service, diligently search the files, papers, records, and dockets in his office, and either make one or more transcripts therefrom and certify to the correctness thereof, and to search or certify that a document or paper, of which the custody legally belongs to him, can not be found. If he refuses, or unreasonably neglects or delays, to make such a search, or to furnish such a transcript or certificate, or makes a false certificate, he is guilty of a misdemeanor." Birdseye's Rev. Stat. (1896), p. 1111, § 83.

A county clerk is entitled to charge "for searching and certifying the title to and incumbrances upon real property for each year for which the search is made, for each name, and each kind of conveyance or lien, five cents." Birdseye's Rev. Stat. (1896), p. 774, § 165k.

The law gives additional fees for searches by the county clerk and register of deeds in the city and county of New York, and provides that it shall be the duty of the clerk and register "on the receipt of any order directing searches in his office to be made, to cause the same to be made without delay, and to certify the correctness of his return within ten days, in case of the clerk, and fifteen days in case of the register, from the receipt of the requisition therefor; and he shall be held legally liable for all damages resulting from errors, inaccuracies or mistakes in his return so certified by him." Bliss' N. Y. Ann. Code, §§ 3305, 3306.

The organization of title guarantee companies which are authorized "to examine titles to real property and chattles real, to procure information in relation thereto, make and guarantee the correctness of searches for all instruments, liens or charges affecting the same; and guarantee or insure bonds and mortgages and the owners of real property and chattels real and others interested therein against loss by reason of defective titles thereto and other incumbrances thereon," is authorized by statute. 2 Birdseye's Rev. Stat. (1896), p. 1654, § 170.

Sec. 37. North Dakota. "It shall be unlawful for any person, firm or corporation to engage in the business of making or compiling abstracts of title to real estate in this state, or to demand and receive pay for the same without first having for use in such business a

complete set of abstract books of all instruments filed or of record in the office of the register of deeds in and for the county in which such business is to be conducted, or in good faith engaged in the preparation of such books, and without first filing in the office of the county auditor of the county in which such business is to be conducted, a bond to the county in the penal sum of ten thousand dollars, with not less than three sureties, to be approved by the board of county commissioners of such county, conditioned for the payment by such abstracters of any and all damages that may accrue to any person for whom any abstract or certificate of title is made by reason of any error, deficiency or mistake in any abstract or certificate of title made and issued by such person, firm or corporation, *provided*, that in counties containing less than ten thousand inhabitants the bond herein required shall be five thousand dollars." Rev. Code (1895), § 1774.

"When any abstracter shall have filed his bond and the same shall have been approved as above provided, he shall be entitled to receive from such county auditor a certificate reciting that such bond has been duly approved, and that the same has been filed in his office, which certificate shall be valid so long as such abstracter shall maintain his sureties upon the bond, unimpaired." Rev. Code (1895), § 1775.

"It is the duty of the county auditor after the bond of any abstracter shall have been filed and approved to issue to such abstracter on demand a certificate of authority in writing, under his hand and official seal, which shall authorize him to make such abstracts. Such certificate shall continue in force for five years, unless recalled or canceled, as provided in the next section. After such certificate shall have been issued, the person, firm or corporation holding the same during the continuance of such certificate shall have full access to all records of the county during office hours, and it is the duty of any person, firm or corporation holding such certificate, to furnish an abstract of the title to any tract of land in such county when requested so to do, on payment of the fees hereinafter provided." Rev. Code (1895), § 1776.

"The bond herein provided for may run during the continuance of such person, firm or corporation in such abstract business, not to exceed five years, and the board of county commissioners may at any time require such abstracter upon ten days' notice to furnish an additional bond, and show cause why the same should not be declared invalid, and the certificate thereof recalled and annulled, and if within such time such additional bond is not furnished, and no sufficient reason is shown to the commissioners why the same should not be required, then the certificate issued to such abstracter shall be recalled and annulled." Rev. Code (1895), § 1777.

"The abstracter or complainant may have an appeal to the district court of such county from the decision of the board of county commissioners, by preserving the evidence taken at the hearing, which shall be certified up by the county auditor of such county; and such appeal shall be summarily decided by the court upon such evidence, and the cost of

such appeal, including the furnishing of such evidence, shall be adjudged against the defeated party." Rev. Code (1895), § 1778.

"Any person, firm or corporation violating any of the provisions of this article shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding one hundred dollars nor less than twenty-five dollars for each offense." Rev. Code (1895), § 1779.

"The provisions of this article shall not be construed to prevent the register of deeds, county treasurer, and clerks of court of the different counties from certifying to abstracts of title to lands from the records of their respective offices, but such officers shall be liable on their official bond for the faithful performance of all acts as abstracters." Rev. Code (1895), § 1780. Section 1781 prescribes the fees which may be charged by abstracters under the provisions of the statute.

"Any person, firm or corporation furnishing abstracts of title to real property under the provisions of this article, shall first provide a seal, which seal shall have stamped thereon the name and location of such person, firm or corporation, and shall deposit with the county auditor an impression of such seal before the certificate mentioned in section 1776, shall issue, which seal shall be affixed to every abstract or certificate of title issued by such abstracter." Rev. Code (1895), § 1782.

"It shall be the duty of each county treasurer to attach his certificate to each abstract of title to real estate of his county that may be presented to him for that purpose, which certificate shall show the amount of taxes due and unpaid against, or tax title affecting the land described in such abstract, as the same appears from the records in his office, and as compensation therefor he shall receive the sum of twenty-five cents for each abstract so certified, and for each failure or refusal to comply with the provisions of this article, he shall be liable to a fine of not exceeding one hundred dollars." Rev. Code (1895), § 1967.

Sec. 38. Oklahoma. "It shall be unlawful for any person, firm or corporation to hold themselves out as abstracters and to engage in the business of abstracting titles to real estate in any of the counties of the Territory of Oklahoma, without first having executed and filed with the county clerk of the county in which said person, firm or corporation intends to engage in the business of abstracting, a bond, to be approved by the board of county commissioners of said county, with three or more good and sufficient sureties residing in the county, and worth not less than double the amount of the bond over and above all debts, liabilities and exemptions, in the sum of five thousand dollars, conditioned that he will properly demean himself, in the business of abstracting, and will pay all damages that may accrue to any person by reason of any incompleteness, imperfections or error in any abstract furnished by him, and will in no way mutilate, deface or destroy any of the records of the several offices to which he may have access, and that he will not in any way interfere with, hinder or delay the several county officers in the discharge of their duties, while using said records in the prosecution of said business of ab-

stracting: *Provided, however,* That the records shall in no case be taken from the county office to which they belong. The person, firm or corporation who shall execute and file said bond of five thousand dollars for said purpose, shall, together with the sureties thereon, be liable on said bond to the Territory of Oklahoma in the penalty of one hundred dollars ($100), and to any county or person who shall be in any way damaged by any mutilation, injury or destruction of any record or records of the several county offices to which he or they may have access, to the amount of damage actually done said county or person; and to any person or persons for whom he or they may compile, make or furnish abstracts of title, to the amount of damage done to said person or persons by any incompleteness, imperfection or error made by said person, firm or corporation, in compiling said abstract." Laws 1899, p. 53, § 1.

"It is hereby made the duty of the county clerk, after the bond of any abstracter has been filed and approved, to issue to such abstracter, on demand, a certificate of authority in writing, under his hand and official seal, to make abstracts. After such certificate shall have been issued a person, firm, or corporation holding the same during the continuance of such certificate, shall have free access to the county records of the several county offices, for the purpose of the prosecution of their said business of abstracting, and the compiling, posting and keeping up of their abstract books necessary for the proper conduct of their said business, under the direct supervision of the county officers having the legal custody of said records; and while handling and using said county records for any of the purposes of this act the said abstracters shall be under the same obligation to protect and preserve said records as the several county officers who have the legal custody of same, and subject to the same penalties for a violation of such duty as said officer would be. And it is hereby made the duty of such abstracter holding such certificate, to furnish an abstract of the title to any tract of land in said county, when requested so to do and on the payment of the fees hereafter provided for." Laws 1899, p. 54, § 2.

"Any person, firm, or corporation who shall hold themselves out as abstracters and engage in the business of abstracting without first having executed and filed the bond in compliance with Section 1 of this Act, and received the certificate hereinbefore provided for, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not exceeding one hundred dollars for each and every such offense." Laws 1899, p. 55, § 3.

"The board of county commissioners of the county where the bond is filed, may at any time require such abstracters, upon ten days' notice, to give additional security upon said bond, and show cause why the same should not be declared invalid and the certificate thereof recalled and annulled; and if within such time the additional security to be approved by said board of county commissioners be not furnished, and no sufficient reason be shown to the commissioners why the same should not be required, then said bond shall be declared invalid and the certificate thereof recalled and annulled, in which event it shall be unlawful for such ab-

stracter to continue or longer engage in the business of abstracting, and for any violation of this section he shall be subject to the penalty prescribed by Section 3 of this Act." Laws 1899, p. 55, § 4.

"The abstracter or claimant may have an appeal to the the district court of such county from the decision of the board of county commissioners, with like effeet and in the manner as is by law provided for appeals from said board, and the costs of such appeal shall be adjudged against the appellant." Laws 1899, p. 55, § 5.

Section 6 of this act prescribes what fees abstracters may charge. Any person, firm or corporation engaged in abstracting who shall violate any provision of this act shall be deemed guilty of misdemeanor. Laws, 1899, p. 56, § 7. "Any abstracter, in the meaning of this act, who shall fraudulently make any false certificate in connection with any abstract, shall be deemed guilty of a felony." Laws 1899, p. 56, § 8. The above act has been in force since August 1, 1899.

Sec. 39. Oregon. "Whenever requested, the clerk shall furnish to any person a certified copy of any portion of the records and files of the circuit and county courts, and no person other than such clerk is entitled to make such copy, or to the use of the records or files for such purpose. Whenever requested, the clerk shall search such records and files, and give a certificate thereof according to the nature of the inquiry, and no person other than such clerk or an attorney of the court shall be entitled to search and examine such records or files, unless he be a party in interest, as appears of record, concerning the matter sought to be examined or inquired of." Hill's Ann. Laws (1887), § 579.

Sec. 40. Pennsylvania. "The recorder of deeds, prothonotaries, clerks of the courts, and all other officers in the city of Philadelphia, whose duty or custom it is, or hereafter may be, to make and certify, or who may hereafter make and certify, searches for for judgments, mortgages or other liens upon real estate in the said city, and the sureties of such officers, shall be liable and responsible for all loss or damage which may happen by reason of any false or erroneous certificate of search made or given by the said officers, or either or any of them, for a period of five years from the time of giving said certificate of search, not only to the person or persons to, for or upon whose order the said certificate of search is made or given, but also to any person or persons claiming title through, from or under such person or persons, or who may suffer loss by reason of the making or giving of any such false or erroneous certificate of search; and the official bonds of all such officers and their sureties shall hereafter be so drawn by the city solicitor of the city of Philadelphia as to secure such liability." Pepper & L.'s Dig., p. 4071, § 8; Pepper & L.'s Dig., p. 3675, § 23.

The above statute applies only to the city of Philadelphia. The liabity of the recorder on a false certificate or search only extends to the party taking the certificate, and does not entitle a future purchaser to recover against him. *Commonwealth* v. *Harmer*, 6 Phila. 90; *McCarahar* v. *Commonwealth*, 5 W. & S. 21 (39 Am. Dec. 106). Though he is only liable

to the person to whom the certificate is given, yet, if he affirms its correctness to another, he may become liable to him. *Siewers* v. *Commonwealth*, 87 Pa. 15. Although there is no law requiring a prothonotary to make searches it has always been the custom for him to do so, and he will be liable on his official bond for mistakes made in a certificate of search, even though his official seal is not attached, and he has received no fee. *Ziegler* v. *Commonwealth*, 12 Pa. 227. The sureties on the bond of a recorder of deeds are liable if he certifies that he has searched the records and can find no mortgage therein recorded, if he receives a fee therefor. *McCarahar* v. *Commonwealth*, 5 W. & S. 21 (1842) (39 Am. Dec. 106). *Contra*, *Commonwealth* v. *Harmer*, 6 Phila. 90 (1865). In *Commonwealth* v. *O'Donnell*, 15 Phila. 197, it was held to be the duty of the recorder of deeds to keep a book in which he "shall immediately make an entry of every deed or writing brought into his office to be recorded, mentioning therein the date, the parties, and the place wherein the lands granted or conveyed by the said deed or writing are situated," and that it is the duty of the recorder to give exemplifications of it when required. The fact that such exemplifications are asked for by one who intends to use them for the purpose of competing with the recorder in issuing certificates of search is no reason for refusing them.

Sec. 41. South Carolina. "The register of mesne conveyances or his deputy shall be required, on application, to give a certificate that no deed, conveyance or mortgage, or other transfer of any particular parcel of lands or tenements, by any particular person, is registered in his office; and, if the register or his deputy shall furnish an incorrect certificate, he shall forfeit and pay to the party the damages that may accrue in consequence thereof." Rev. Stat. (1893), § 821. By act No. 58, of the Acts of 1896, the office of register of mesne conveyances is abolished except as to the counties of Charleston and Greenville, and the duties and powers of the office are transferred to the clerk of the court of common pleas and general sessions. Acts 1896, p. 122.

Sec. 42. South Dakota. "It is unlawful for any person, firm or corporation to engage in the business of making or compiling abstracts of title to real estate in the state of South Dakota, or to demand and receive pay for the same without first filing in the office of the county clerk or auditor of the county in which such business is conducted a bond to the county in which said business of abstracting is conducted, in the penal sum of ten thousand dollars ($10,000) dollars, with not less than three sureties, residents of the county, to be approved by the board of county commissioners of such county conditioned for the payment by such abstracters of any and all damages that may accrue to any party or parties by reason of any error, deficiency or mistake in any abstract or certificate of title made and issued by said person, firm or corporation, provided, that in counties of less than ten thousand (10,000) inhabitants, the bond herein required shall be five thousand ($5,000) dollars." Ann. Stat. (1899), § 2349.

"When any abstracter shall have duly filed his bond and the same shall have been approved, as above provided, he shall be entitled to receive a certificate from such county clerk (or auditor) that said bond has been by the board of county commissioners of such county duly approved, and that the same has been filed in his office, which certificate shall be valid so long as such abstracter shall maintain his sureties upon the bond as herein provided for unimpaired. And it is hereby made the duty of said county clerk or auditor after the bond of any abstracter shall have been filed and approved to issue to such abstracter on demand a certificate of authority in writing, under his hand and seal, to make such abstracts, which shall continue in force for five (5) years, unless recalled or canceled, as provided in Section 3 of this Act. After such certificate shall have been issued, the person, firm, or corporation, holding the same, during the continuance of such certificate, shall have full access to all records of said county during office hours; and it is hereby made the duty of any person, firm, or corporation holding said certificate, to furnish an abstract of the title to any tract of land in said county when requested so to do, and on payment of the fees hereafter provided." Ann. Stat. (1899), § 2350.

"The bond herein provided for may run during the continuance of said person, firm, or corporation in said abstract business not to exceed five years, and the board of county commissioners of the county where the bond herein provided for may be filed, may at any time require such abstracter upon ten days' notice to give additional security upon said bond, and show cause why the same should not be declared invalid, and the certificate thereof recalled and annulled, and if within such time the additional security to be approved by said board of county commissioners be not furnished, and no sufficient reason be shown to the commissioners why the same should not be required, then said bond shall be declared invalid and the certificate thereof be recalled and annulled." Ann. Stat. (1899), § 2351.

"The abstracter or complainant may have an appeal to the circuit court of such county from the decision of the board of county commissioners by preserving the evidence taken at the hearing, which shall be certified up by the county clerk (or auditor) of such county, and such appeal shall be summarily decided by the court upon such evidence, and the cost of such appeal including the furnishing of said evidence shall be adjudged against the defeated party." Ann. Stat. (1899), § 2352.

"Any person, firm or corporation violating the provisions of this act, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine not exceeding one hundred dollars, and not less than twenty-five dollars, for each and every offense." Ann. Stat. (1899), § 2353.

"The provisions of this act shall not be construed to prevent the register of deeds, treasurers and clerks of court of the different counties of this state from certifying to abstracts of titles to land from the records of their respective offices provided, that such officers shall be liable on their official bonds for the faithful performance of all acts as abstract-

ers." Ann. Stat. (1899), § 2354. Section 2355 prescribes the fees that may be charged by abstracters.

"Any person, firm or corporation furnishing abstracts of title to real property under the provisions of this act, shall first provide a seal, which seal shall have stamped thereon the name and location of said person, firm or corporation, and shall deposit with the county clerk or auditor an impression of said seal, before the certificate mentioned in section two, shall issue, which said seal shall be affixed to every abstract or certificate of title issued by said abstracters." Ann. Stat. (1899), § 2356.

"It is hereby made the duty of each county treasurer of the county where the property is situated to attach his certificate to each and all abstracts of title to real estate that may be presented to him for that purpose, which certificate shall show the amount of due and unpaid taxes against, or tax title affecting, the land described in such abstract, as the same shall appear from the records in his office, and for compensation therefor he shall receive the sum of twenty-five cents for each abstract so certified, and for each failure or refusal to comply with the provisions of this act he shall be liable to a fine not to exceed the sum of one hundred dollars." Ann. Stat. (1899), § 957.

Sec. 43. Texas. Private corporations may be formed by "any person or association of persons for the purpose of making, compiling and owning an abstract of titles to lands and liens of all character on any property, or any other abstract or records of this state or any county thereof, required by law to be recorded." Sayles' Civ. Stat. (1897), art. 642. cl. 40.

Sec. 44. Utah. "Every recorder must keep an 'abstract record,' which shall show by tracts every conveyance or incumbrance recorded, the date and character of the instrument, time of filing the same, and the book and page where the same is recorded, which book shall be so kept as to show a true chain of title to each tract and the incumbrances thereon, as shown by the records of his office." Rev. Stat. (1898), § 620.

"The recorder shall, upon the application of any person, and upon the payment or tender of the fee therefor, make searches for conveyances, mortgages and all other instruments, papers or notices recorded or filed in his office affecting the title to any piece of property, and furnish a certified abstract thereof if any such abstract or certificate is incomplete, erroneous or defective in any important particular, affecting the property in respect to which the abstract is requested, the county shall be liable to the party aggrieved for the amount of the actual damage sustained; *provided*, however, such liability shall not accrue in favor of any person who had actual notice of the error or mistake complained of." Rev. Stat. (1898), § 627.

"If any recorder neglects or refuses to make the searches and to give the certificate required by this chapter, he shall be liable to the party aggrieved for three times the amount of damages which may be occasioned thereby." Rev. Stat. (1898), § 630.

"Every person desiring to open and conduct an abstract business, shall, before entering upon such business make application for a license to the board of county commissioners of the county in which he proposes to conduct said business. Said commissioners shall, if they deem said applicant a proper and competent person, issue a license authorizing said applicant during all reasonable business hours and under the authority of the county recorder to have free access to said records; provided, such license shall not issue until said applicant shall file a bond with approved sureties in the penal sum of not less than ten thousand dollars, conditioned for the faithful abstracting of said records and the issuing of correct abstracts of title. Said bond shall also provide that the said person, his agent, or employee shall be held liable for any mutilation of the records in his possession. Every person conducting an abstract business shall be liable to the person aggrieved for mistakes and errors in abstracts for the amount of actual damages sustained; provided, that such liability shall not accrue in favor of any person who had actual notice of the error or mistake complained of." Rev. Stat. (1898), § 629.

"Any abstract of title to any piece, parcel or parcels of real estate or mining claim or claims, certified to by any licensed abstracter or county recorder of the state of Utah, shall be admissible in evidence in any action or proceeding in any court existing by virtue of the laws of the state of Utah, and shall be *prima facie* evidence of the facts therein stated without further proof, and the certificate to the same of such licensed abstracter or county recorder shall be *prima facie* evidence of the authority of such licensed abstracter or county recorder." Laws 1899, ch. 36, p. 54.

"The abstracts mentioned in the preceding section, in order to be admissible in evidence as therein provided, shall be certified to under the hand and seal of such licensed abstracter or county recorder, which certificate shall set forth what such abstract purports to contain and shall also contain a statement of the authority of the maker thereof." Laws 1899, p. 54, ch. 36, § 2. (Approved March 9, 1899.)

Sec. 45. Wyoming. In each county in the territory there shall be abstract books kept, in which all transfers and mortgages of real property, and all liens upon real estate shall be briefly entered." Rev. Stat. (1887), § 1849.

" It shall be the duty of the county clerk of each county, to enter in dark colored ink in such abstract book in the order of time, all transfers of real estate heretofore recorded in their respective offices; and all mortgages, mechanics' liens and judgment liens, shall also be entered in said books in the order of time, in red ink." Rev. Stat. (1887), § 1850.

"All instruments affecting real estate in this territory, left for record in the county clerk's office, shall be abstracted as soon as it is practicable to enter the same, in the order of time." Rev. Stat. (1887), § 1851.

" All abstract entries of lands shall be made in a book, well bound and properly ruled, and at the head lines shall describe the legal division of land, or sub-division, naming section, township and range, according to the United States surveys, when the same is so described in the instru-

ment filed for record; and the books shall contain ruled paralleled columns, in which respectively shall be entered the name of the grantor or mortgagor, grantee or mortgagee, character of instrument, consideration expressed in instrument, date of instrument, date of filing in clerk's office, description of the premises, and such other pertinent marginal remarks as will show whether such instrument was properly witnessed and acknowledged or not." Rev. Stat. (1887), § 1852.

"All abstract entries of town lots shall be made in a similar manner to those of lands, but shall be in a separate book, provided for that purpose by the board of county commissioners. The number of the lot and block shall appear in the head lines." Rev. Stat. (1887), § 1853.

"All abstract books shall be open to the inspection of every person desiring to examine the same, during all reasonable office hours, and no fee shall be charged for their inspection by any officer." Rev. Stat. (1887), § 1854

"Hereafter no person, company, or corporation shall engage in or carry on the business of making or furnishing abstracts of title to any real estate within this state, without first having a full and complete set of abstract records of title of all the real estate situated in the county in which such business is carried on; or, in case such abstract business is limited to furnishing abstracts of real estate situated in an incorporated city or town, in such case a complete set of all abstracts of all real estate in such city or town shall be kept, and such person, company, or corporation shall also first enter into bond to the people of the State of Wyoming for the use of any person who shall sustain loss or damage by reason of the failure of any such person, company, or corporation in the performance of his or their duty as such abstracter. Said bond shall be in the penal sum of ten thousand dollars, with sufficient sureties, to be approved by and filed with the county clerk of such county, and conditioned for the faithful performance of his or their duty as such abstracter." Laws 1890, p. 173, ch. 41, § 1.

"Any person, company or corporation, who shall carry on, or attempt to carry on, any business mentioned in section one of this act, and who shall fail, neglect or refuse to fully comply with the provision of this act," shall be subject to a fine of five hundred dollars for each offense. Laws 1890, ch. 41, § 2.

ABUTTING OWNERS.

EPITOME OF CASES.

Sec. 46. Right of abutting owner to use street—Remedies for special injuries. An abutting owner has the right to run electric wires above the street for the purpose of connecting buildings on his property with the wires already on poles in the public streets erected for the purpose of supplying lights, *Borough of Brigantine* v. *Holland Trust Co.*, N. J. Eq. (37 Atl. Rep. 488); but he has no right to occupy any portion of land appropriated for a street by the erection of a retaining wall for his lot, *Towne* v. *City of Newton*, 167 Mass. 311 (45 N. E. Rep. 745); nor to build a driveway upon the land of an adjoining owner, although it is within the limits of the highway, for his private use and convenience, because of the difficulty of passing directly from his land to the highway, *Burr* v. *Stevens*, 90 Me. 500 (38 Atl. Rep. 547). A city may enjoin an abutting lot owner from removing stone, earth and other material from within the limits of a street, or from impairing its embankments, which make it more expensive and difficult to fit the whole width of the street for travel. *City of Madison* v. *Mayers*, 97 Wis. 399 (73 N. W. Rep. 43; 65 Am. St. Rep. 127; 40 L. R. A. 635). Where an abutter's right to an injunction against the operation of a telephone company in a street is dependent upon his ownership of the fee in the street, his complaint is insufficient where it fails to allege such ownership, or that the street was dedicated to the public use by one who at the time owned the fee. It is not sufficient to allege part ownership. *Erwin* v. *Central Union Tel. Co.*, 148 Ind. 365 (46 N. E. Rep. 667; 47 N. E. Rep. 668). An abutting owner who does not own the fee simple of any part of a highway cannot maintain an action for its obstruction unless he has sustained

some special injury not common to all who use the highway. *Pittsburg, C. C. & St. L. Ry. Co.* v. *Noftsger*, 148 Ind. 101 (47 N. E. Rep. 332); *Perkins* v. *Ross*, Tenn. (42 S. W. Rep. 58). The owner of land abutting upon a street or alley, one end of which is obstructed so that he cannot have egress from his property to other streets in that direction, suffers an injury peculiar to himself by reason of a public nuisance and may recover nominal damages upon that fact alone. *Bannon* v. *Murphy*, Ky. (38 S. W. Rep. 889). Citing, *Brakken* v. *Railway Co.*, 29 Minn. 41 (11 N. W. Rep. 124). A statute (Ind. Rev. Stat. 1894, § 3541) empowering cities to establish and regulate public markets does not authorize the occupation of a street for such a market, and an abutting owner especially injured by such a use may maintain injunction. *City of Richmond* v. *Smith*, 148 Ind. 294 (47 N. E. Rep. 630).

Sec. 47. Railroads in streets. In Kentucky it is held that an abutting owner cannot complain of the construction of a railroad in the street unless he suffers an injury distinct from that suffered by the public. *Dulaney* v. *Louisville & N. R. Co.*, 100 Ky. 628 (38 S. W. Rep. 1050). In Mississippi it is held that the construction of a railroad in a street is the appropriation of it to an entirely new and independent servitude on account of which an abutting owner may recover damages; and where a railroad defends against such an action under a claim of right to use the street by virtue of its having occupied it for forty years, it must be confined to the nature and character of its use of such street during such prescriptive period. *Alabama & V. Ry. Co.* v. *Inge*, Miss. (22 So. Rep. 294). In New Jersey, in the absence of express legislative authority, a city or borough has no power to authorize by ordinance a railroad to occupy its streets longitudinally. *Inhabitants of Burlington* v. *Pennsylvania R. Co.*, 56 N. J. Eq. 259 (38 Atl. Rep. 849); *Tallon* v. *Mayor of Hoboken*, 60 N. J. L. 212 (37 Atl. Rep. 895); *Thompson* v. *Ocean City R. Co.*, 60 N. J. L. 74 (36 Atl. Rep. 1087). In the last case the court say: "A charter authorizing the construction of a railroad between designated points—the exact location of the road between the specified termini being left in the company's

discretion—is an implied authority to cross highways along the route, but confers no right to occupy longitudinally streets or highways lying in the general route of the road. The authority to make such use of streets or highways must be expressly given, or, if conferred by implication, it must be by a necessary implication." Under Pa. Pub. Laws 1871, p. 1860, an abutting owner upon a public highway who is specially damaged by the unlawful construction of a railroad therein, may maintain an injunction. *Hopkins* v. *Catasauqua Mfg. Co.*, 180 Pa. St. 199 (36 Atl. Rep. 785). Upon a particular state of facts it is held that abutting owners on opposite sides of a street owning the fee therein may construct a railroad across the street connecting their premises, the municipal authorities having consented thereto, by a resolution declaring that the public would suffer no inconvenience from the construction of the proposed track. *Hanbury* v. *Woodward Lum. Co.*, 98 Ga. 54 (26 S. E. Rep. 477.) Where a railroad company has located its road on the east side of a street beyond the center thereof, no condemnation of the rights of one owning land abutting on the west side of the street is required. Alabama Code, § 3207, construed and applied. *New & Old Decatur B. & T. R. Co.* v. *Karcher*, 112 Ala. 676 (21 So. Rep. 825). In Missouri, a recent statute prohibits the municipal authorities of a city or town from granting the right to lay railroad tracks in any street except upon the petition of owners representing more than one-half of the frontage on such street. Laws 1899, p. 105.

Sec. 48. Railroads in streets—Recovery of damages by abutting owner. Damages resulting to abutting property from the construction of a railroad in the street, on account of the blowing of whistles, ringing of bells, noises from engines and trains, the blowing off of chaff or smoke, vibration, inability to converse during the time trains are passing, interference with the turning of teams in the street in front of the property, and the diversion of travel from the street, are special damages for which no recovery can be had and concerning which no evidence can be given unless they are specially pleaded. *Root* v. *Butte A. & P. Ry. Co.*, 20 Mont. 354 (51 Pac. Rep. 155). It is held that where a rail-

road was constructed in a street under permission granted by the proper city authorities, subject to the rights of the adjacent lot owners, an abutting owner may recover damages accruing to his property on account of the maintenance of such road, although he did not own the property when the road was built and received no assignment of damages on account of it from the owner at that time. The measure of damages in such a case is the diminished rental value. *Hoffman* v. *Flint & P. M. R. Co.*, 114 Mich. 816 (72 N. W. Rep. 167). Where work is done by a railroad company in a street of a city under authority from the city to occupy the street for its track the city is not liable to adjoining lot owners for injury to their lots for such work, but they must look to the company. *Jordan* v. *City of Benwood*, 42 W. Va. 812 (26 S. E. Rep. 266; 57 Am. St. Rep. 859; 36 L. R. A. 519). An abutting owner who seeks to recover damages on account of the occupation of a public way by the tracks of a railroad company, with the assent of the proper municipal authorities, has the burden of showing that the power was improperly exercised in the particular case. Mo. Rev. Stat. 1889, § 1255, subd. 26, § 2543. *Brown* v. *Chicago Great Western Ry. Co.*, 137 Mo. 529 (38 S. W. Rep. 1099). Md. Code, art. 23, § 169; Acts 1890, ch. 139, construed and applied—occupation of street by railroad—recovery of damages. *McColgan* v. *Baltimore Belt R. Co.*, 86 Md. 325 (37 Atl. Rep. 716).

Sec. 49. Railroads in streets—Damages recoverable by one not owning the fee. Where one does not own the fee in a highway, he cannot recover any damages for injuries common to the community in general, but is confined to damages for such injuries as are substantially different in kind from those suffered by the community in general. A material interruption of his means of access is a special injury, but increased danger from fire is held not to be. *Pittsburg, C. C. & St. L. Ry. Co.* v. *Noftsger*, 148 Ind. 101 (47 N. E. Rep. 332). The court say: "In *Railway Co.* v. *Eberle*, 110 Ind. 547, 552 (11 N. E. Rep. 467), this court said: 'The "community in general" does not, of course, mean those persons who use the street and highway, and yet reside at such a distance from the railroad as to suffer none of the annoyances or inconveniences

incident to its construction and operation. The interest in the street which is peculiar and personal to the abutting lot owners, and which is distinct and different from that of the general public, is the right to have free access over it to his lot and building, substantially in the manner he would have enjoyed the right in case there had been no interference with the street. The right of access by way of the street is an incident to the ownership of the lot, which cannot be taken away or materially impaired without liability to the owner to the extent of the damages actually incurred. In this respect, and in this only, is the interest of the abutting property owner different in the street in front of and beyond the line of his lot from that of the public. The location and operation of a railroad upon a public highway may occasion incidental embarrassment and inconvenience to an abutting lot owner, but until it cuts off or materially interrupts his means of access to his property, or imposes some additional burden on the soil, his injury and damages, while different in degree, are the same in kind as those of the community at large. For such merely incidental damages as result from the careful construction and prudent operation of a railroad on the land of another, even though it be in a public street, the adjacent proprietor cannot recover. These are damages common to all those whose lands are in such close proximity to a railroad, which happens to be located on the land of another, as to suffer incidental injury therefrom. For such injuries or inconveniences, in the absence of a statute giving him redress therefor, the property owner is not entitled to recover. *Railroad Co.* v. *Heisel*, 38 Mich. 62; *Railroad Co.* v. *Andrews*, 30 Kan. 590 (2 Pac. Rep. 677); *City of Chicago* v. *Union Bldg. Ass'n*, 102 Ill. 379 (40 Am. Rep. 598); *Rigney* v. *City of Chicago*, 102 Ill. 64.' The law as declared in *Railroad Co.* v. *Eberle*, 110 Ind. 547, 552 (11 N. E. Rep. 467), was approved by this court in *Dantzer* v. *Railway Co.*, 141 Ind. 604 (39 N. E. Rep. 223; 50 Am. St. Rep. 848; 34 L. R. A. 769); and *Decker* v. *Railway Co.*, 133 Ind. 493 (33 N. E. Rep. 349)."

Sec. 50. Railroads in streets established by dedication. When a dedication of a street for the purposes of a highway has been made, with an express reservation in writing,

to the donors, their heirs or assigns, of the right to designate a portion of such street or highway for railroad purposes, persons who afterwards take conveyances of lots according to the map, and agreements in writing, by which such dedication was made, indorsed upon such map, with knowledge of such reservation in the dedication, or where such reservation is contained in the conveyances, are estopped from denying the validity of an ordinance of a city giving consent to the use of a part of such street for railroad purposes, if there remains what is necessary of the street for their protection. *Tallon* v. *Mayor of Hoboken*, 59 N. J. L. 388 (36 Atl. Rep. 698). A bill by an abutting owner, to enjoin the construction of a railroad in a street, which it is alleged was established by dedication by his predecessors filing a map and selling lots in reference thereto, is defective, where it fails to show the existence of such map and the other attendant facts necessary to establish the dedication. *Thompson* v. *Ocean City R. Co.*, N. J. Eq. (37 Atl. Rep. 129).

Sec. 51. Street railroads. The construction of a street railway in a highway as a part of the route different from that authorized by the franchise granting the privilege, may be enjoined by an abutting owner of the fee. *Canastota Knife Co.* v. *Newington Tramway Co.*, 69 Conn. 146 (36 Atl. Rep. 1107). The power given to the city of Hoboken, N. J., by the 11th section of its charter, N. J. Pamph. Laws, 1861, p. 526, to grant permission by ordinance to any person or corporation to lay railroad tracks and run rail cars thereon, in or over any of the streets within said city, is limited to the construction and operation of street railways, and does not authorize the construction of an ordinary railroad in its streets. *Tallon* v. *City of Hoboken*, 60 N. J. L. 212 (37 Atl. Rep. 895). A street railway company is not liable for exemplary damages on account of obstructing an abutting owner's access to a street, where the obstruction was removed by the company before the trial of the action brought on account of it. *Biloxi City R. Co.* v. *Maloney*, 74 Miss. 788 (21 So. Rep. 561).

Sec. 52. Elevated railroads. Starr & C. Ann. Ill. Stat., Vol. 2, ch. 114, pars. 201–208, requiring the consent of the owners of more than half of the abutting frontage to authorize the granting of permission to construct an elevated railroad in the street does not enlarge the individual rights of the abutters in any way. *Doane* v. *Lake St. El. R. Co.*, 165 Ill. 510 (46 N. E. Rep. 520; 56 Am. St. Rep. 265; 36 L. R. A. 97). A general power given to cities to provide for and change the location of railroads, will authorize an ordinance removing the limitations imposed by a former ordinance on the width and location of the right of way of an elevated railroad. *Tudor* v. *Chicago & S. S. R. T. R. Co.*, 164 Ill. 78 (46 N. E. Rep. 446; 36 L. R. A. 879). A release by an abutting owner to an elevated railroad of the easements or rights appurtenant to the premises which had been taken or were affected by the maintenance and operation of the road, effects an abandonment of the abutter's easements of light, air and access, afforded by the street in front of the premises. *Ward* v. *Metropolitan El. Ry. Co.*, 152 N. Y. 39 (46 N. E. Rep. 819). An abutting owner cannot enjoin the construction of an elevated railway upon the ground that the consent of the city has not been legally obtained, because of facts alleged which do not appear upon the face of the proceedings. His remedy is by an action at law to recover damages he may suffer on account of such illegal construction, and in such a case he may recover in a single action all his damages present and future. *Doane* v. *Lake St. El. R. Co.*, 165 Ill. 510 (46 N. E. Rep. 520; 56 Am. St. Rep. 265; 36 L. R. A. 97). Upon the first proposition this case is followed in *Stewart* v. *Chicago General St. Ry. Co.*, 166 Ill. 61 (46 N. E. Rep. 765). Where, in a proceeding to condemn land for an elevated railroad, witnesses are allowed to testify as to its effect on the value of adjacent property, they may state their previous experience in such matters. *Metropolitian West Side El. R. Co.* v. *White*, 166 Ill. 375 (46 N. E. Rep. 978). In determining the damage to abutting property by the construction of an elevated railroad, it is not admissible to show the damages accruing to other property several blocks distant. *Lake Roland El. Ry. Co.* v. *Frick*, 86 Md. 259 (37 Atl. Rep. 650.

Sec. 53. Shade trees. A municipal officer authorized to construct a sidewalk is not liable for the removal of trees, where in making such removal he acts honestly without being actuated by any improper or dishonest motive, in good faith, and because, in his judgment, it is reasonable and necessary to remove them in order to make and complete the improvement authorized. *Wilson* v. *Simmons*, 89 Me. 242 (36 Atl. Rep. 380). Under Kan. Gen. Stat. 1889, par. 789, a city of the second class may contract for planting, maintaining, and protecting shade trees on its streets, and for the purpose of paying for the same may make assessments and collect taxes in the same manner as provided for assessing and collecting taxes for sidewalks. *Heller* v. *City of Garden City*, 58 Kan. 268 (48 Pac. Rep. 841). Mass. Pub. Stat., ch. 54, § 8—penalty for injuring or destroying shade trees—amended, Laws 1899, p. 327.

Sec. 54. Change of grade—Municipal liability—Measure of damages. A purchaser of an abutting lot, after the municipality has established a paper grade line, but before actual physical grading conforming the street to that line, is not precluded from recovering damages to his lot, but he cannot recover damages to buildings erected after the adoption of such paper grade. *Blair* v. *City of Charleston*, 43 W. Va. 62 (26 S. E. Rep. 341; 64 Am. St. Rep. 887; 35 L. R. A. 352). To the same effect is the case of *City of Omaha* v. *Williams*, 52 Neb. 40 (71 N. W. Rep. 970). R. I. Pub. Stat., ch. 65, §§ 34–41; Gen. Laws, ch. 72, §§ 28–35, construed and applied—recovery of damages from municipality for change of grade. *Almy* v. *Goggeshall*, 19 R. I. 549 (36 Atl. Rep. 1124). Minn. Sp. Laws 1885, ch. 5, construed and applied—damages, by change of grade, to property situate in the city of Minneapolis. *Abel* v. *City of Minneapolis*, 68 Minn. 89 (70 N. W. Rep. 851).

The measure of damages for injury to property from the change of a street grade is the diminution of the market value of the property on account of the change. In estimating the damages, all damage and injury arising from the change causing a diminution in value of the property are to be regarded, abating all special benefits to the property enhancing its value

arising from the change of grade, but not general benefits shared by the property owner in common with others in the community at large. *Blair* v. *City of Charleston*, 43 W. Va. 62 (26 S. E. Rep. 341; 64 Am. St. Rep. 837; 35 L. R. A. 852). See opinion for discussion of what constitutes "special benefits." In an action against a railroad company by an abutting owner to recover for injuries for a change of grade in a highway wrongfully occupied by it, the measure of damages is the consequent depreciation in the value of the plaintiff's property. *Thompson* v. *Citizens' Traction Co.*, 181 Pa. St. 131 (37 Atl. Rep. 205). Speculative damages cannot be recovered by a base ball association having a leasehold interest in real estate, in an action brought by it against a city for damages on account of its changing the grade of a street. *Philadelphia Ball Club* v. *City of Philadelphia*, 182 Pa. St. 362 (38 Atl. Rep. 357).

Sec. 55. Change of "natural grade" of street—Municipal liability. Applying W. Va. Const., art. 3, § 9, providing that "private property shall not be taken or damaged for public use without just compensation," it is held that a municipality is liable to an abutting owner for damages resulting from its changing the natural grade of a street. *Blair* v. *City of Charleston*, 43 W. Va. 62 (26 S. E. Rep. 341; 64 Am. St. Rep. 837; 35 L. R. A. 852). See opinion for exhaustive review of authorities. Construing S. Dak. Const., art. 6, § 13, providing that "private property shall not be taken for public use or damaged without just compensation," it is held that an abutting owner may recover damages resulting to his property on account of a municipality changing the "natural grade" of the street. *Searle* v. *City of Lead*, 10 S. Dak. 312 (73 N. W. Rep. 101; 39 L. R. A. 845). The court say: "The reports disclose many cases under the former system where streets were cut down or filled to such a depth as to render the property of the abutting owner comparatively worthless, and yet such owner was without remedy. In other words, the private property of such owner was, in effect, taken for the use or benefit of the public, without any compensation made to the owner. Most of these decisions were based largely upon the decision of the supreme court of Massa-

chusetts in *Callender* v. *Marsh*, 1 Pick. 417, which was a street grade case, in which a deep cut had been made. But in that case the learned chief justice who wrote the opinion fully recognized the injustice of the old rule as applied to the facts in that case. He says: 'These are cases, without doubt, where the individual may suffer from the exercise of this power, and thus be made to contribute involuntarily much more than his proportion to the public convenience; but such cases seem not to be provided for, and must be left to that sense of justice which every community is to be governed by. * * * Cases apparently hard will occur. The present is such a one.'

But the framers of our organic law deemed it proper to fully protect the rights of the abutting property owner in the constitution itself, and not leave him to the 'sense of justice' by which a community is supposed to be governed. The framers of our organic law must be presumed to have been familiar with the provisions in the earlier state constitutions, and of the many cases in which private property had been, in effect, taken for public use, for which the property owner seemed to have no redress; and it is quite manifest that they inserted the term 'or damaged' for the express purpose and object of protecting private property from the arbitrary exercise of municipal or other corporate power. The constitutional provision is unquestionably a wise and just one, and well calculated to protect property owners from injustice and wrong on the part of municipal or other corporations or individuals invested with the privilege or taking private property for public use and should be given a liberal construction by the courts, in order to make it effectual in protecting the rights of the citizens. The words 'or damaged' were, without doubt, added to the usual provisions contained in earlier constitutions for the purpose of extending the remedy to incidental or consequential injuries to property, not actually taken for public use, in the ordinary acceptance of the term; and the same was adopted by the people with this express guaranty that just compensation should be made for property so taken or damaged for public use. And there is the further express guaranty that this compensation shall be paid before the proposed improvement can be made, or, in the language of the constitu-

tion, 'possession is taken.' The ascertainment and payment of damages that may be caused is a condition precedent to the right of the municipality to proceed. We are of the opinion, therefore, that, upon the facts stated in the complaint, the court below was authorized to make the order. The words 'or damaged' are found in the later constitutions of several of the states, among which are Illinois, Missouri, Nebraska, Pennsylvania, California and West Virginia; and the construction we have placed upon these words is fully sustained by the courts of these states. *Werth* v. *City of Springfield*, 78 Mo. 107; *Reardon* v. *City & Co. of San Francisco*, 66 Cal. 492 (6 Pac. Rep. 325); *Blanchard* v. *City of Kansas*, 16 Fed. Rep. 444; *Harmon* v. *City of Omaha*, 17 Neb. 548 (23 N. W. Rep. 503); *Johnson* v. *Parkersburg*, 16 W. Va. 402 (27 Am. Rep. 779); *Chambers* v. *Railroad Co.*, 69 Ga. 320; *McElroy* v. *Kansas City*, 21 Fed. Rep. 257; *Borough of New Brighton* v. *United Presbyterian Church*, 96 Pa. St. 331; *City of Chicago* v. *Taylor*, 125 U. S. 161 (8 Sup. Ct. Rep. 820). The supreme court of Missouri, in the first case above cited, says: 'When property is damaged by establishing the grade of a street, or by raising or lowering the grade of a street previously established, it is a damage for public use within the meaning of the constitution.' In the case last above cited, the supreme court of the United States quotes from the supreme court of the state of Illinois in *Railroad Co.* v. *Ayres*, 106 Ill. 518, the following: 'It is needless to say that our decisions have not been harmonious on this question; but in the case of *Rigney* v. *City of Chicago*, 102 Ill. 64, there was a full review of the decisions of our courts, as well as the courts of Great Britain, under a statute containing a provision similar to the provision of our constitution. The conclusion there reached was that, under this constitutional provision, a recovery may be had in all cases where private property has sustained a substantial damage by the making and using an improvement that is public in its character; that it does not require that the damage shall be caused by a trespass or an actual physical invasion of the owner's real estate, but if the construction and operation of the railroad or other improvement is the cause of the damage, though conse-

quential, the party may recover. We regard that case as conclusive on this question.' "

Sec. 56. Vacation of street or highway. Only owners of property abutting upon a street can recover damages for its vacation. *Symons* v. *City & Co. of San Francisco*, 115 Cal. 555 (47 Pac. Rep. 458). The court say: "Owners of other realty have no such property in a street as entitles them to damages for its vacation. Whatever detriment or inconvenience they may suffer by the closing of the street they bear in common with the community at large, for the public convenience and welfare, as decreed by the proper legislative authorities in ordering the vacation. *Coster* v. *Mayor, etc.*, 43 N. Y. 414; *Insurance Co.* v. *Stevens*, 101 N. Y. 411 (5 N. E. Rep. 353); *Smith* v. *City of Boston*, 7 Cush. 254; *Castle* v. *County of Berkshire*, 11 Gray 26; *City of East St. Louis* v. *O'Flynn*, 119 Ill. 200 (10 N. E. Rep. 395; 59 Am. Rep. 795); *Heller* v. *Railroad Co.*, 28 Kan. 625; *Kimball* v. *Homan*, 74 Mich. 699 (42 N. W. Rep. 167)." In Montana it is held that in the absence of a statute giving them such a right the owners of land along and through which a public road runs are not entitled to damages on vacation of the road by the proper authorities. *State* v. *Board of Com'rs*, 19 Mont. 582 (49 Pac. Rep. 147). Citing, *Brady* v. *Shinkle*, 40 Ia. 576. Upon this subject, see Ballards' Law of Real Property, Vol. III. §§ 3-7. Where the vacation of a portion of a street operates to leave the remainder a *cul de sac*, abutting owners thereon, the value of whose property is lessensed by the vacation, are entitled to recover damages under Pa. Act., April 21, 1858, § 6 (Pa. Laws, p. 386), giving the right to recover for injury to private property by the vacation of a street. In re Vacation of Part of Melon St., 182 Pa. St. 397 (38 Atl. Rep. 482; 38 L. R. A. 275). Where a street designated on the original plat of a town site located on public lands of the United States, and entered and platted by the probate judge for the benefit of the occupants (so that the title to the streets passed from the government of the United States, through the probate judge, to the county), is afterwards vacated, the title to the land included in the street vests in the lot owners on each side in equal parts; and this is the case where the vacated street is all included within

the original town site, and the lots on one side are in a different quarter section of land afterwards platted as an addition. *Southern Kansas Ry Co.* v. *Showalter*, 57 Kan. 681 (47 Pac. Rep. 831). Ia. Code 1878, §§ 564, 565, 567, providing that upon vacation of a street, a proportionate part thereof becomes a part of each of the abutting lots, does not apply to a vacation of a street by a landowner made after he has executed a plat of the lands, but before the street has been accepted by the proper authorities or any lands have been sold in reference thereto. *Brown* v. *Taber*, 103 Ia. 1 (72 N. W. Rep. 416).

Sec. 57. Assessments against abutting owners for municipal improvements—Constitutionality of frontage system of assessments. When empowered by its charter to do so, a city may make municipal assessments for improvements a personal charge against an abutting owner. *Storrie* v. *Cortes*, 90 Tex. 283 (38 S. W. Rep. 154; 35 L. R. A. 666). A statute which authorizes a municipality to assess the cost of paving a street and constructing a sewer against the abutting property owners is constitutional. *City of Parkersburg* v. *Tavenner*, 42 W. Va. 486 (26 S. E. Rep. 179). An assessment for municipal improvements grossly in excess of the value of the property will not be enforced. *James* v. *City of Louisville*, Ky. (40 S. W. Rep. 912). Where special taxes or assessments against property to improve the streets of a city are void, they cannot be enforced solely on the ground of the benefits of the improvements to the owners of the abutting lots or lands. *Harmon* v. *City of Omaha*, 53 Neb. 164 (73 N. W. Rep. 671). Citing, *Buckley* v. *City of Tacoma*, 9 Wash. 258 (37 Pac. Rep. 441). A conveyance of a narrow strip abutting on a street, executed and accepted by the grantee for the purpose of avoiding a street assessment upon the remaining property, is void. *Eagle Mfg. Co.* v. *City of Davenport*, 101 Ia. 493 (70 N. W. Rep. 707). A lien on abutting property for street improvements, authorized by art. 2, § 7, of the charter of the city of Covington, Ky., is held to be paramount to the lien of a mortgage taken after the charter was enacted but before the ordinance authorizing the improvements was passed. *Dressman* v. *Farmers & Trad-*

ers' Nat. Bank, 100 Ky. 571 (38 S. W. Rep. 1052; 36 L. R. A. 121).

A statute (Del. Act, April 29, 1891), providing for the assessment of the cost of a complete sewer system for a city, based upon an estimate of its cost, against the property abutting the lines of the sewer by a uniform rate per foot frontage, and per square foot for a certain distance back, is constitutional. *English* v. *City of Wilmington*, 2 Marv. (Del.) 68 (37 Atl. Rep. 158). See opinion for collation of authorities. For additional cases sustaining the constitutionality of the frontage system of assessment see *City of Denver* v. *Knowles*, 17 Colo. 204 (30 Pac. Rep. 1041; 17 L. R. A. 135); *Shelly* v. *Detroit*, 45 Mich. 431; *Palmyra* v. *Morton*, 25 Mo. 594; *St. Louis* v. *Clemens*, 49 Mo. 554; *Rutherford* v. *Hamilton*, 97 Mo. 543 (11 S. W. Rep. 249); *White* v. *People*, 94 Ill. 604; *Craw* v. *Tolona*, 96 Ill. 255 (36 Am. Rep. 143); *Galesburg* v. *Searles*, 114 Ill. 217 (29 N. E. Rep. 686); *Springfield* v. *Green*, 120 Ill. 269 (11 N. E. Rep. 261); *O'Riley* v. *Kingston*, 114 N. Y. 439 (21 N. E. Rep. 1004); *Whiting* v. *Townsend*, 57 Cal. 515; *Newman* v. *Emporia*, 41 Kan. 583 (21 Pac. Rep. 593); *Allen* v. *Woods*, Ky. (45 S. W. Rep. 106); *Baltimore* v. *J. H. Hospital*, 56 Md. 1; *State* v. *Reis*, 38 Minn. 371 (38 N. W. Rep. 97); *State* v. *Fuller*, 34 N. J. L. 227; *Ernest* v. *Kunkle*, 5 Ohio St. 520; *Corry* v. *Foltz*, 29 Ohio St. 320; *Beaumont* v. *Wilkesbarre*, 142 Pa. St. 198 (21 Atl. Rep. 888); *Davis* v. *Lynchburg*, 84 Va. 861 (6 S. E. Rep. 230); *Cleveland* v. *Tripp*, 13 R. I. 59; *Kingman et al.* v. *Metropolitan Sewerage Commissioners*, 153 Mass. 566 (27 N. E. Rep. 778); *Rolph* v. *City of Fargo*, 7 N. Dak. 640 (76 N. W. Rep. 242). *Roberts* v. *First National Bank*, N. Dak. (79 N. W. Rep. 1049).

ACKNOWLEDGMENTS.

EPITOME OF CASES.

Sec. 58. Necessity of acknowledgment—Sufficiency and conclusiveness of certificate. An acknowledgment is not necessary to the validity of a conveyance as between the parties to it. *Holmes* v. *Hull*, 50 Neb. 656 (70 N. W. Rep. 241); *Linton* v. *Cooper*, 58 Neb. 400 (78 N. W. Rep. 731). A certificate of acknowledgment is good without a seal when the statute does not require the officer to have a seal. *Fish* v. *Hopping*, 169 Ill. 105 (48 N. E. Rep. 328). In Colorado it is held that where, at the time a deed was acknowledged in a foreign country, there was no statute providing for the proof of the execution of a deed conveying land in that territory by acknowledgment taken outside of the United States, the certificate of such acknowledgment is a nullity. *Trowbridge* v. *Addoms*, 28 Colo. 518 (48 Pac. Rep. 535). It requires clear, strong and convincing evidence to impeach a certificate of acknowledgment. *Nimocks* v. *McIntyre*, 120 N. C. 325 (26 S. E. Rep. 922); *Saginaw Building & Loan Association* v. *Tennant*, 111 Mich. 515 (69 N. W. Rep. 1118). If the certificate of a married woman's acknowledgment is in proper form and signed by the proper official, it can only be attacked for fraud or surprise, not for mere irregularity in taking the privy examination, and the fraud must be that of the conveyee or his agent. *Ronner* v. *Welcker*, 99 Tenn. 623 (42 S. W. Rep. 439)

Sec. 59. Who may take acknowledgments. Where a deed, made to several grantees, conveys a fractional interest in the property described to each of them, an acknowledgment by the grantor before one of the grantees is good as to all except the interest of such grantee. *Murray* v. *Tulare Irrigation Co.*, 120 Cal. 311 (49 Pac. Rep. 568). Applying

Cal. Code Civ. Proc., § 1963, subd. 25, declaring that, if uncontradicted, the identity of the person shall be presumed from the identity of the name, it is held that where the names of the mortgagee and a notary public taking the acknowledgment thereof appear to be the same, the acknowledgment is void and the record of it does not impart notice. *Lee* v. *Murphy*, 119 Cal. 364 (51 Pac. Rep. 549). Citing, *Wilson* v. *Traer*, 20 Ia. 231; *Brown* v. *Moore*, 38 Tex. 645; *Groesbeck* v. *Seeley*, 13 Mich. 329; *Stevens* v. *Hampton*, 46 Mo. 404; *Wasson* v. *Connor*, 54 Miss. 351; *Davis* v. *Beasley*, 75 Va. 491; *Bowden* v. *Parrish*, 86 Va. 67 (9 S. E. Rep. 616; 19 Am. St. Rep. 878); *Withers* v. *Baird*, 7 Watts 277 (32 Am. Dec. 754); Devl. Deeds, §§ 476, 477; Proff. Not. (2d Ed.), §§ 42, 48; Webb, Record Titles, § 67. A notary who is the general managing agent of a building and loan association, is a large stockholder therein, and receives as compensation a percentage of its gross earnings, cannot take the acknowledgment of a mortgage executed to it. *Miles* v. *Kelley*, 16 Tex. Civ. App. 147 (40 S. W. Rep. 599). Ill. Laws, 1845, p. 28; Laws 1847, pp. 82, 87, applied—acknowledgment by commissioners in another state. *Fisk* v. *Hopping*, 169 Ill. 105 (48 N. E. Rep. 823).

Sec. 60. Acknowledgments by married women. A substantial and not a literal compliance with Idaho Rev. Stat., § 2960, prescribing a form for a married woman's acknowledgment, is all that the law requires. *Northwestern & Pac. H. Bank* v. *Rauch*, Idaho (51 Pac. Rep. 764). If her acknowledgment is correctly made, but defectively certified, such certificate of acknowledgment may be reformed by judgment of the district court under the provisions of Civil Code, p. 8, tit. 6, so as to make the certificate correctly state the acknowledgment. *Bunnell & Eno Inv. Co.* v. *Curtis*, Idaho (51 Pac. Rep. 767). But the certificate must substantially conform to the statute; and while it is *prima facie* evidence of the truth of its recitals, if it fails to show the examination and acknowledgment as required by law, it will be presumed that such necessary acts were not done. *Co-operative Sav. & L. Ass'n* v. *Green*, Idaho (51 Pac, Rep. 770).

Sec. 61. Statutes curing defective acknowledgments. A statute (N. C. Acts 1898, ch. 297), validating the probate of a deed of a married woman whose privy examination was had before the husband's acknowledgment, contrary to the provisions of the statute, will cover cases where the execution of a deed by the husband is not proved by acknowledgment, but by a subscribing witness; and such statute is not invalid as between the parties to deeds because retrospective. *Barrett* v. *Barrett*, 120 N. C. 127 (26 S. E. Rep. 691; 36 L. R. A. 226). N. C. Laws 1868–69, ch. 35, legalizes the privy examination of a married woman made by the chairman of a court of pleas and quarter sessions, under Act March 2, 1867, when the court was not in session and at places other than the court house. *Spivey* v. *Rose*, 120 N. C. 163 (26 S. E. Rep. 701). Starr & C. Ann. Ill. Stat., Vol. 1, p. 977, construed and applied—statute curing defective acknowledgments taken by commissioners. *Fisk* v. *Hopping*, 169 Ill. 105 (48 N. E. Rep. 328).

ADVERSE POSSESSION.

EPITOME OF CASES.

Sec. 62. As to what constitutes adverse possession. Possession must be actual, exclusive, open, notorious and be accompanied with a *bona fide* claim of title against the title of all others. *Drumright* v. *Hite*, Va. (26 S. E. Rep. 588); *Parkersburg Industrial Co.* v. *Schultz*, 48 W. Va. 470 (27 S. E. Rep. 255). Acts of possession exercised in connection with the holder of the legal title are not adverse. *McCloskey* v. *Hayden*, 169 Ill. 297 (48 N. E. Rep. 482). The possession of land as the result of an entry on premises, by permission of the legal owner, will not become adverse until some act is committed by the occupant rendering it so and notice thereof brought home to the holder of the legal title; and where the owner of land occupies it concurrently with one who has entered with his permission, such possession of

the owner negatives any presumption that the other's possession is adverse to him. *Ward* v. *Edge*, 100 Ky. 757 (39 S. W. Rep. 440). Occupancy by an adjoining proprietor of another's land under a mistake as to the location of the boundary line between them, and without any intention of claiming further than the true and correct line, does not constitute adverse possession, *Ernsting* v. *Gleason*, 137 Mo. 594 (39 S. W. Rep. 70); *Roecker* v. *Haperla*, 138 Mo. 33 (39 S. W. Rep. 454); but the last case holds that the possession in such a case is adverse up to the true boundary although its location is not known. Construing and applying Ga. Code, § 5855, providing that a *bona fide* purchaser who has been in possession of real property for four years shall hold the same discharged from the lien of any judgment against his vendors, it is held that the possession contemplated by the statute does not necessarily involve an actual personal residence upon the premises, but such occupancy by visible signs of dominion as will serve to put persons interested upon notice of the adverse claim. *Hale* v. *Robertson*, 100 Ga. 168 (27 S. E. Rep. 987). Occupancy of lands by a donee under a parol gift gives him merely a possessory right, which is lost when the possession ceases and does not pass to his heir unless the latter continues the actual possession. *Brown* v. *Watkins*, 98 Tenn. 454 (40 S. W. Rep. 480). Where her husband is entitled to the possession, rents and profits of her real estate, adverse possession cannot commence against a married woman until the death of her husband. *Garrett* v. *Weinberg*, 48 S. C. 28 (26 S. E. Rep. 8). Possession by one who has for over thirty years leased and controlled land, paid the taxes and asserted ownership will not be presumed to have been merely permissive because the party asserting it lived with his brother-in-law who held the record title and did not pay any money for it *Shaw* v. *Smithes*, 167 Ill. 269 (47 N. E. Rep. 528). Particular acts held insufficient to constitute sufficient adverse possession to start the running of the statute of limitations. *Nicholson* v. *Aronson*, 58 Kan. 814 (48 Pac. Rep. 917). One, who under color of title, pays taxes on unimproved and uninclosed land in Arkansas for seven years, "shall be deemed and held to be in possession" of such lands. Laws 1899, p. 117.

Sec. 63. As to what constitutes adverse possession —Possession by enclosure. A fence erected in pursuance of an agreement between adjoining owners that if the correct line is afterwards found the fence would be placed upon it, does not constitute a basis for the claim of adverse possession. *Lowe* v. *Cunningham*, Tenn. (39 S. W. Rep. 1052). One who merely encloses the land of his neighbor by the erection of a fence upon an erroneous boundary line, which he believes to be the true line, does not hold possession of such land adversely until he makes a claim of possession of that nature. *Rasdell* v. *Shumway*, 58 Kan. 818 (51 Pac. Rep. 285). Upon this subject the supreme court of Alabama say: "It is also well settled, that if one of two adjacent landowners extend his fence so as to embrace within his enclosure lands belonging to his neighbor, in ignorance of the true boundary line between them, and with no intention of claiming such extended area, but intending to claim adversely only to the real and true boundary line, wherever it may be, such possession will not be adverse or hostile to the true owner. But if the fence is believed to be the true line, and the claim of ownership is to the fence, even though the established division is erroneous, a different rule will apply, as has been held; for, in such case, there is a clear intention to claim to the fence as the true line, and the possession does not originate in an admitted possibility of a mistake." *Taylor* v. *Fomby*, 116 Ala. 621 (22 So. Rep. 910).

Possession by inclosure to be adverse, must be such as to be exclusive possession, a real and substantial inclosure, an actual occupancy which is definite, positive and notorious; and a partial inclosure of land, capable of total inclosure leaving part of its boundary open, is not sufficient. *Parkersburg Industrial Co.* v. *Schultz*, 43 W. Va. 470 (27 S. E. Rep. 255). The court say: "Let us look at the character of possession in this case. There was no building, cultivation, or improvement upon this land. The only basis for adversary possession is an inclosure by a fence. Under the evidence the question presents itself whether this fence was such as the law contemplates to give adversary possession. Here we must first note that, as it defeats the true title, adversary possession must be taken strictly, and the facts to sustain it proven

clearly. *Irvine* v. *McRee*, 5 Humph. 554 (42 Am. Dec. 468); *Hale* v. *Glidden*, 10 N. H. 402. The evidence shows that in 1843 or 1844 a fence, composed perhaps of slabs, inclosed two sides of these lots, but not the whole area. Certainly one side was left open. Our cases hold that adverse possession must be 'exclusive;' that is, shut the adverse claimant out. In *Jackson* v. *Shoonmaker*, 2 Johns. 230, Chief Justice Kent said that a possession fence, by felling trees and lapping them one upon the other around the land, was 'too loose' a mode of taking possession to be considered adverse possession. He said: 'There must be a real and substantial inclosure, an actual occupancy, a *pessio pedis*, which is definite, positive, and notorious, to constitute an adverse possession, when that is the only defense to countervail a legal title.' Same in *Coburn* v. *Hollis*, 8 Metc. (Mass.) 125. In *Hale* v. *Glidden*, 10 N. H. 397, it was held that an inclosure by a brush fence and cutting wood from a wood lot, where a person had no color of title, is insufficient; the possession must be actual, permanent, and exclusive, marked by definite boundaries. In *Armstrong* v. *Risteau*, 5 Md. 256 (59 Am. Dec. 115), it was held that fences on three sides of an oblong or square piece of land are not such an inclosure as would constitute adverse possession where such inclosure is necessary. See Busw. Lim,. § 247. Possession to be adverse must be actual, continued, visible, notorious, distinct, and hostile. It must be such that the owner may be presumed to have notice of it and its extent. It must be open, visible, and exclusive. *Core* v. *Faupel*, 24 W. Va. 288, point 5. It has been several times held that protection of the land by substantial inclosure sufficient to turn stock is necessary, and that it is not sufficient where it is insufficient to turn stock. Note to *Plume* v. *Seward*, 4 Cal. 94 (60 Am. Dec. 604). A poor fence around a part of this small area, leaving it open, with no building or cultivation, would not be distinct, hostile, possession, excluding the owner, giving him warning of adverse claim, but would rather indicate an abandonment of a once-intended claim."

Sec. 64. Extent of possession without color of title. One in possession of land without paper title has adverse possession only to the extent of his enclosure or actual improve-

ment. *Parkersburg Industrial Co.* v. *Schultz*, 48 W. Va. 470 (27 S. E. Rep. 255); *Carter* v. *Hornback*, 189 Mo. 288 (40 S. W. Rep. 898). The possession of one entering as a trespasser is confined to the land actually occupied by him, and he cannot claim title by adverse possession to wild and uninclosed land adjoining that actually occupied and used by him, from the mere fact that he cut natural hay thereon, and let his stock run over and pasture upon it. *Sage* v. *Larson*, 69 Minn. 122 (71 N. W. Rep. 928). The adverse right derived from mere possession is limited to that which has been possessed. The right asserted by a railroad company to build, maintain, and use a bridge over a highway for the passage of trains is consistent with the right asserted by other persons to possess the land, subject to the public use, and to lay pipes beneath the surface of the highway. The former claim of right is not inherently adverse to the latter. *Pennsylvania R. Co.* v. *Breckenridge*, 60 N. J. L. 588 (38 Atl. Rep. 740). One holding adverse possession of shore land is confined to his actual occupancy on the shore, unless by notorious acts of ownership, in so far as he may be able to exercise them, he furnishes evidence of his intention to claim and hold to the middle of the stream. *Stanberry* v. *Mallory*, Ky. (39 S. W. Rep. 495). Where the operations of a coal mining company owning a tract of land have been such as to create a severance of the mineral estate from the surface estate, one having full knowledge of such operations who subsequently holds adverse possession of a portion of the surface estate of such lands for the prescriptive period does not acquire any title to the minerals beneath such portion, although they have not been actually removed by the company. *Delaware & H. Canal Co.* v. *Hughes*, 183 Pa. St. 66 (38 Atl. Rep. 568; 63 Am. St. Rep. 743; 38 L. R. A. 826). For particular case determining the extent of possession, where the possession was held by a tenant of the claimant, see *Zundel* v. *Baldwin*, 114 Ala. 328 (21 So. Rep. 420).

Sec. 65. Extent of possession under color of title—Conflicting patents. Adverse possession of a portion of a tract of land under color of title gives constructive possession of the entire tract. *Worthley* v. *Burbanks*, 146 Ind. 584 (45

N. E. Rep. 779); *Smith* v. *Keyser*, 115 Ala. 455 (22 So. Rep. 149). Possession of a part will be construed to extend to the whole congressional subdivision to which the occupant holds color of title or makes claim of right. *Libbey* v. *Young*, 108 Ia. 258 (72 N. W. Rep. 520). The express description in a deed of realty introduced as color of title will not be extended beyond its terms because of a belief by the holder under it that it covered land not embraced in that description, nor because of any expressed intention in the mind of the grantor that it should cover land not described in the deed itself, there being no suggestion of mistake in the drawing of it. *Williamson* v. *Tison*, 99 Ga. 791 (26 S. E. Rep. 766). Where a party holds a large tract of land under patent from the state, which tract is divided into a line of narrow surveys running across it, held by junior patentees, who have acquired good title to said narrow surveys, and the holder of the senior patent takes possession of the land within the bounds of his patent on the east side of said line of narrow surveys, such possession will not be limited by the boundaries of said narrow surveys but will extend to the exterior bounds of his patent on the west side of said narrow surveys. Where there is an interlock between the land held under said elder patent and a junior patent, and the junior patentee is in possession under his patent, but outside of the interlock, and the senior patentee is in possession, by actual improvement, of any portion of his land under said senior patent, the junior patentee will be limited by the boundaries of the elder patent. *Ilsley* v. *Wilson*, 42 W. Va. 757 (26 S. E. Rep. 551).

Sec. 66. Color of title—Necessity of—What constitutes. Adverse possession need not be based upon color of title. *Vier* v. *City of Detroit*, 111 Mich. 646 (70 N. W. Rep. 139); *Ward* v. *Nestell*, 118 Mich. 185 (71 N. W. Rep. 593). A void deed may constitute color of title. *Randolph* v. *Casey*, 48 W. Va. 289 (27 S. E. Rep. (231). Citing, *Welborn* v. *Anderson*, 87 Miss. 155; *Irey* v. *Markey*, 132 Ind. 546 (32 N. E. Rep. 309). A tax deed, void because based on a sale made at the wrong place and the wrong time, constitutes color of title where it is executed by the proper officer and gives a correct description of the property. *Bennet* v. *North Colo. Springs*

L. & Imp. Co., 23 Colo. 470 (48 Pac. Rep. 812). A deed cannot constitute color of title for land which it does not purport to convey. *Laughlin* v. *City of Denver*, 24 Colo. 255 (50 Pac. Rep. 917). Where a wife takes a quitclaim deed of land from her husband, whose only interest therein she knows to be under a contract of purchase which she afterwards forfeits by failure to comply with its terms, such instrument does not constitute color of title. *Laraway* v. *Zenor*, 100 Ia. 181 (69 N. W. Rep. 416). Where an administrator arranged with a third person to purchase at his sale for the benefit of such administrator and executed a deed to him and he in turn deeded the land to the administrator, it is held that the last deed gave to the administrator color of title. *McNeill* v. *Fuller*, 121 N. C. 209 (28 S. E. Rep. 299). Particular deed held sufficient to constitute color of title. *Taylor* v. *Smith*, 121 N. C. 76 (28 S. E. Rep. 295).

Sec. 67. Title by—General principles—Who may acquire. In South Carolina it is held that adverse possession of land for twenty years raises the presumption of a grant. *Miller* v. *Cramer*, 48 S. C. 282 (26 S. E. Rep. 657). The presumption is that the possession is in subordination to the actual title and one who relies upon a title by twenty years possession must show that such possession was held by the possessor in open hostility to the rights of the true owner. *Heller* v. *Cohen*, 154 N. Y. 299 (48 N. E. Rep. 527). Possession and use of, and payment of taxes upon, land for six years, followed by fifteen years possession, by a purchaser at an execution sale of it, as the property of the first possessor is held sufficient to create a presumption of grant to the first possessor. *Hasson* v. *Klee*, 181 Pa. St. 117 (37 Atl. Rep. 184). Title to land condemned for the right of way of a railroad, may be reacquired by the original owner by adverse possession. *Donahue* v. *Illinois Cent. R. Co.*, 165 Ill. 640 (46 N. E. Rep. 714). In Kansas it is held that the adverse claimant must be a resident in order for the statute of limitations to run; it does not run in favor of nonresidents even if in possession by tenants or agents. *Davis* v. *Threlkeld*, 58 Kan. 768 (51 Pac. Rep. 226).

Sec. 68 Title by—Character of title acquired. One who has acquired title by adverse possession may assert it affiirmatively. *Miller* v. *Cramer*, 48 S. C. 282 (26 S. E. Rep. 657); *Parkersburg Industrial Co.* v. *Schultz*, 43 W. Va. 470 (27 S. E. Rep. 255); *Duren* v. *Kee*, 50 S. C. 444 (27 S. E. Rep. 875). It will support an action to quiet title. *Harms* v. *Kransz*, 167 Ill. 421 (47 N. E. Rep. 746); *Vier* v. *City of Detroit*, 111 Mich. 646 (70 N. W. Rep. 139). It will sustain an action for trespass, *Coppage* v. *Griffith*, Ky. (40 S. W. Rep. 908); or support ejectment against one subsequently obtaining possession. *Donahue* v. *Illinois Cent. R. Co.*, 165 Ill. 640 (46 N. E. Rep. 714). When the statute of limitations has run in favor of one holding adverse possession, no subsequent acknowledgment of the former owner's title, except by deed sufficient to pass title to land, will divest the title acquired by adverse possession. *Sage* v. *Rudnick*, 67 Minn. 362 (69 N. W. Rep. 1096).

Sec. 69. Title by—What property may be acquired. Title acquired by adverse possession may itself in turn be destroyed by adverse possession. *Parkersburg Industrial Co.* v. *Schultz*, 43 W. Va. 470 (27 S. E. Rep. 255). A private party cannot hold adverse possession of lands, while such lands are a portion of the "Indian country," and the right of occupancy in the Indians has not been terminated by the United States. *Kreuger* v. *Schultz*, 6 N. Dak. 310 (70 N. W. Rep. 269). After restrictions on the alienation of lands patented by incompetent Wyandotte Indians were removed by the treaty of 1867 (15 U. S. Stat. 517) title thereto might be gained by occupancy under claim of ownership; and persons who were in the actual possession of the lands at the time the treaty took effect under void deeds from an incompetent Indian acquired title when they continued to hold such possession without interruption, openly, adversely, and under claim of title for fifteen years. *Schrimpcher* v. *Stockton*, 58 Kan. 758 (51 Pac. Rep. 276). Title to a building may be acquired by adverse possession, although another has the title to the supporting land. *Fairbanks* v. *San Francisco & N. P. Ry. Co.*, 115 Cal. 579 (47 Pac. Rep. 450). The court say: "For the purposes of adverse possession and the invocation of the stat-

ute of limitations, there may be cleavage of corporeal real estate horizontally as well as vertically. This appears from the cases relating to mineral strata and tunnels. *Caldwell* v. *Copeland*, 87 Pa. St. 427 (78 Am. Dec. 486); *Lillibridge* v. *Coal Co.*, 143 Pa. St. 293, 299 (22 Atl. Rep. 1085; 24 Am. St. Rep. 544; 13 L. R. A. 627); *Powell* v. *Lantzy*, 173 Pa. St. 543 (34 Atl. Rep. 450); *Bevan* v. *Cement Co.*, 8 Reports 47." Title to the surface estate may be acquired by adverse possession where the original owner of the entire estate has conducted such mining operations thereon as amount to a severance of the minerals. *Delaware & H. C. Co.* v. *Hughes*, 183 Pa. St. 66 (38 Atl. Rep. 568; 63 Am. St. Rep. 743; 38 L. R. A. 826). The use by the public of the right of way or depot grounds of a railroad shall not ripen into title, except the use be for a connected street across such right of way or ground. Ind. Laws 1899, p. 477.

Sec. 70. Title by—Elements necessary—Particular cases. To confer title by adverse possession, the possession must be actual, open, notorious, exclusive, hostile and continuous for the prescriptive period, and the burden of proof is on one claiming such a title to prove that his possession was of this character. *Beasley* v. *Howell*, 117 Ala. 499 (22 So. Rep. 989); *McSpadden* v. *Starrs Mountain Iron Co.*, Tenn. (42 S. W. Rep. 497). The continuity of the possession must be clearly proven; it is not sufficient to raise it upon a mere presumption. *Woods* v. *Hull*, 90 Tex. 228 (38 S. W. Rep. 165). A claim of title by adverse possession cannot be sustained by one who has admitted by judicial proceedings, the possession of the party against whom he claims, within the prescriptive period. *Day* v. *Philbrook*, 89 Me. 462 (36 Atl. Rep. 991). In Nebraska, the claim of ownership of one in adverse possession need not be well founded in law or in fact, it need not be under a *bona fide* belief that it is well founded, or need it be under color of title. *Oldig* v. *Fisk*, 53 Neb. 156 (78 N. W. Rep. 661). Title by adverse possession is established by evidence showing that the claimant during the prescriptive period has visited the land almost every Sunday, mowed it every year, pastured his horses on it, took his friends out to see it, dug a well, constructed fences

and improvements thereon, and surveyed and established corners soon after his first claim of title. *Sullivan* v. *Eddy*, 164 Ill. 391 (45 N. E. Rep. 837). Title by possession cannot be proved simply by recitals in the deeds of the claimant's grantors. *Hudgins* v. *Simons*, 94 Va. 659 (27 S. E. Rep. 606).

Particular evidence held sufficient to show adverse possession for twenty years. *Smith* v. *Keyser*, 115 Ala. 455 (22 So. Rep. 149). Particular case in which title is held to have been acquired by adverse possession. *Libbey* v. *Young*, 103 Ia. 258 (70 N. W. Rep. 520). Particular evidence held insufficient to show title by adverse possession. *Beard* v. *Utley*, Tenn. (39 S. W. Rep. 735). Particular evidence held insufficient to show uninterrupted adverse possession for five years. *Lacoste* v. *Eastland*, 117 Cal. 673 (49 Pac. Rep. 1046). For particular fact case concerning the acquisition of title by adverse possession, see *Metz* v. *Metz*, 48 S. C. 472 (26 S. E. Rep. 787).

Sec. 71. Title by — Occupancy required — Rule where lands are barren and unproductive. Actual possession by the claimant is necessary. Evidence that he appointed an agent to look after the land, who, on several occasions took parties to see it, walked over it and tried to sell it, does not show actual possession by the claimant. *John Henry Shoe Co.* v. *Williamson*, 64 Ark. 100 (40 S. W. Rep. 708). Merely going in the winter time on land enclosed and used as a pasture by another, and cutting and taking away wood, failing to do even this some years, is not a continuous or exclusive possession. *Harms* v. *Kransz*, 167 Ill. 421 (47 N. E. Rep. 746). The use of land by cutting and hauling fire wood, saw timber, and cutting and hauling fence rails from it and cleaning up the same, do not constitute actual possession, but are merely acts tending to show claim of ownership. *Carter* v. *Hornback*, 139 Mo. 238 (40 S. W. Rep. 893). Under the Tennessee statute it is held that to produce a bar by possession where there are interfering laps under conveyances, there must be an actual possession of some part of the land in dispute. *O'Dell* v. *Swaggerty*, Tenn. (42 S. W. Rep. 175).

Adverse possession of barren lands not available for any

productive use, may be shown by recording the deed under which the claimant asserts title, removing valuable timber, surveying the land and establishing boundaries, constructing fences and buildings, paying taxes, going upon the land at intervals and asserting ownership, and employing agents in the locality to look after it without proof of actual occupation. *Worthley* v. *Burbanks*, 146 Ind. 534 (45 N. E. Rep. 779). The court say: "The important inquiry upon the facts found, is as to whether the appellant occupied or possessed, under the rule in adverse possession, any part of the land for the required term. Appellees insist that actual occupancy is necessary, while appellant urges that occupancy is necessary only where it is possible with some return from the occupancy or use, and is not required if the land is not susceptible of some remunerative use. That there was not an actual occupancy for 20 years by or on behalf of the appellant and her grantors is not in doubt, nor is it questionable that the lands were not available for any productive use. The precise inquiry, therefore, is, what is meant by 'possession,' as applied to lands of the character of those in question here? It is manifest that there can be no absolutely unvarying rule with reference to every class of real estate, and that the required occupancy of or dominion over a section of desert lands, or of a mining camp, a non-navigable lake, a prairie, a forest, a fertile farm in a high state of cultivation, or a town lot, would not answer as to a lot in the business center of a populous and thrifty city. As said in *Ewing* v. *Burnet*, 11 Pet. 41, 'so much depends on the nature and situation of the property, the uses to which it can be applied, or to which the owner or claimant may choose to apply it, that it is difficult to lay down any precise rule, adapted to all cases.' And, as said in the early case of *Robinson* v. *Swett*, 8 Me. 316, where it was 'wild and uncultivated land, the jury were not to expect the same evidence of occupancy which a cultivated farm would present to them.' In this connection it is said in 2 Wood, Lim. (2 Ed.) § 267: 'The kind of possession which will be sufficient must depend largely upon the character of the land, the locality, and the purposes to which it can be put. * * * And where the land is so situated as not to admit of any permanent useful improvement, neither residence, cultivation, nor actual occupa-

tion are necessary, where the continued claim to the premises is evidenced by notorious acts of ownership, such as a person would not exercise over lands which he did not own. It is not necessary that the occupation should be such that a mere stranger, passing the land, would know that some one was asserting title to a dominion over it. It is not necessary that the land be cleared or fenced, or that any building be put upon it. The possession of land cannot be more than the exercise of exclusive dominion over it.' Numerous cases are cited by the author which support the text. See *Ewing* v. *Burnet*, 11 Pet. 41; *Draper* v. *Shoot*, 25 Mo. 197 (69 Am. Dec. 462); *Ford* v. *Wilson*, 35 Miss. 490 (72 Am. Dec. 137); *Morrison* v. *Kelly*, 22 Ill. 610 (74 Am. Dec. 169); *Royall* v. *Lisle's Lessee*, 15 Ga. 545 (60 Am. Dec. 712); *Eddy* v. *Gage*, 147 Ill. 162 (35 N. E. Rep. 847); *Tucker* v. *Shaw*, 158 Ill. 326 (41 N. E. Rep. 914); *Whitaker* v. *Shooting Club*, 102 Mich. 454 (60 N. W. Rep. 983); *Twohig* v. *Leamer*, 48 Neb. 247 (67 N. W. Rep. 152); *Mooney* v. *Cooledge*, 30 Ark. 640; *Normant* v. *Eureka Co.*, 98 Ala. 181 (12 So. Rep. 454; 39 Am. St. Rep. 45); *Bowen* v. *Guild*, 130 Mass. 121; *Booth* v. *Small*, 25 Iowa 177; *Brett* v. *Farr*, 66 Iowa, 684 (24 N. W. Rep. 275); *Murphy* v. *Doyle*, 37 Minn. 113 (33 N. W. Rep. 220); *Cooper* v. *Morris*, 48 N. J. L. 607 (7 Atl. Rep. 427); *Stockton* v. *Geissler*, 48 Kan. 612 (23 Pac. Rep. 619); *Foulke* v. *Bond*, 41 N. J. L. 527."

Sec. 72. Title by—Payment of taxes. It is proper to prove the payment of taxes to sustain a claim of adverse possession. *Pasley* v. *Richardson*, 119 N. C. 449 (26 S. E. Rep. 32). Payment of taxes by one in possession after they have been once paid by the owner, is not a compliance with Cal. Code Civ. Proc. § 325, making payment of taxes for five years a necessary element of title by adverse possession. *Carpenter* v. *Lewis*, 119 Cal. 18 (50 Pac. Rep. 925). A claim of title by adverse possession on account of five years' payment of taxes, under claim and color of title under Mills' Ann. Colo. Stat. § 2923, cannot be made as to land which was not assessed for taxation. *Laughlin* v. *City of Denver*, 24 Colo. 255 (50 Pac. Rep. 917). Prior to May 21, 1881, adverse possession could be established under the laws of Idaho without proving pay-

ment of the taxes, but Code Civ. Proc. § 150 (see 10 Gen. Laws, 1880–81, p. 29), makes it necessary in order to establish adverse possession, to prove the payment of taxes. *Brose* v. *Boise City Ry. & Ter. Co.*, Idaho (51 Pac. Rep. 758). Title is not acquired by seven years' possession and payment of taxes, under Ill. Rev. Stat. ch. 88, § 6, unless the claimant shows that he has paid all the taxes lawfully assessed against the land. *Donahue* v. *Illinois Cent. R. Co.*, 165 Ill. 640 (46 N. E. Rep. 714). To establish title under the statute, the evidence must show payment of taxes by or on behalf of the person having color of title and actual possession, and the burden is on the party claiming under such title to prove the payment by clear and satisfactory evidence. The necessary payment of taxes is not shown by tax receipts which do not contain a sufficient description to identify the land. *Bell* v. *Neiderer*, 169 Ill. 54 (48 N. E. Rep. 194). Where a title under this statute is relied upon as a defense to an action of ejectment, there must have been seven years' adverse possession and payment of taxes before the suit was brought. *Converse* v. *Dunn*, 166 Ill. 25 (46 N. E. Rep. 747). A railroad company may acquire title to land for a right of way under this statute. *Chicago, M. & St. P. Ry. Co.* v. *Grant*, 167 Ill. 489 (47 N. E. Rep. 750). Particular evidence held sufficient to show an acquisition of title under this statute. *Peadro* v. *Carriker* 168 Ill. 570 (48 N. E. Rep. 102). Starr & C. Ann. Ill. Stat., Vol. 2, p. 1539, § 6 (Rev. Stat. ch. 88, § 6), construed and applied—title by seven years' possession and payment of taxes. *French* v. *Goodman*, 167 Ill. 345 (47 N. E. Rep. 737).

Sec. 73. Title by—Time necessary. In Alabama ten years' adverse possession confers title. *Beasley* v. *Howell*, 117 Ala. 499 (22 So. Rep. 989). In Kansas fifteen years' adverse possession under claim of title, confers title. *Schrimpcher* v. *Stockton*, 58 Kan. 758 (51 Pac. Rep. 276). In Nebraska ten years' adverse possession gives title to real estate. *City of Florence* v. *White*, 50 Neb. 516 (70 N. W. Rep. 50); *Fink* v. *Dawson*, 52 Neb. 647 (72 N. W. Rep. 1037); *Oldig* v. *Fisk*, 53 Neb. 156 (73 N. W. Rep. 661). Under N. C. Code, § 144, twenty years' adverse possession is required to give title in fee to the possessor as against all persons not

under disability. *Walden* v. *Ray*, 121 N. C. 287 (28 S. E. Rep. 398). In North Dakota ten years' "actual open adverse and undisputed possession of land" accompanied by payment of "all taxes and assessments legally levied thereon" confers title. Laws 1899, p. 280. In South Carolina, a person who has held land adversely for ten years has a good title by virtue of such possession which may be affirmatively asserted against one not protected by some disability. *Cave* v. *Anderson*, 50 S. C. 298 (27 S. E. Rep. 698); *Duren* v. *Kee*, 50 S. C. 444 (27 S. E. Rep. 875). In Tennessee it is held that a party in possession of land under a valid deed purporting to convey a fee and defining boundaries can perfect his title by seven years' open and adverse possession without showing that the land was granted by that state or the state of North Carolina. *O'Dell* v. *Swaggerty*, Tenn. (42 S. W. Rep. 175).

Sec. 74. Title by—Tacking possessions. Seven years' adverse possession under color of title, under N. C. Code, § 141, cannot be made by tacking possessions unless they are under color of title. *Morrison* v. *Craven*, 120 N. C. 827 (26 S. E. Rep. 940). In South Carolina, adverse possession by parties in privity cannot be tacked. Code 1870, §§ 98 *et seq.* construed and applied. *Garrett* v. *Weinberg*, 48 S. C. 28 (26 S. E. Rep. 8); *Burnett* v. *Crawford*, 50 S. C. 161 (27 S. E. Rep. 645). But in the second case cited it is held that the possession of an heir can be tacked to that of his ancestor. A privity of possession between occupants for the purpose of acquiring the benefit of tacking possessions, may arise from a parol bargain and sale of the possession of the premises followed by delivery thereof, as well as by formal conveyance from one occupant to another. *Rambert* v. *Edmondson*, 99 Tenn. 15 (41 S. W. Rep. 935; 63 Am. St. Rep. 819).

Sec. 75. Interruptions of adverse holding. Adverse possession is lost by a break in its continuity by abandonment or other cause before the bar of the statute is complete, and seisin is restored to the true owner. A subsequent entry is a new disseisin and cannot be added to the former possession. *Parkers-*

burg Industrial Co. Schultz, 48 W. Va. 470 (27 S. E. Rep. 255). A mere vacancy in the occupancy of agricultural land for a reasonable time, caused by the abandonment of the land by one tenant and the putting of another in possession, does not necessarily break the continuity of the landlord's possession, when there is no intention on his part to abandon the possession. *Beasley* v. *Howell*, 117 Ala. 499 (22 So. Rep. 989). Where a railroad having a grant of a right of way over land, after surveying and staking its line abandons the same and the owner and subsequent purchasers occupy it as a part of the farm, the company by subsequently making a survey across the land and sending a man to take possession of the right of way which he did by walking over it, were held insufficient to establish re-entry as against the continued and actual adverse possession of the occupants. *Maysville & B. S. R. Co.* v. *Holton*, 100 Ky. 665 (39 S. W. Rep. 27). An acknowledgment by the disseisor of the record or paper title, as by accepting a lease from the owner of it, is in the nature of an admission that he had no title, and is competent evidence tending to prove that his possession was not adverse. *Sage* v. *Rudnick*, 67 Minn. 362 (69 N. W. Rep. 1096). The purchase, or attempted purchase of an outstanding title, by one in possession and before the expiration of the statutory period, is not alone sufficient to break the continuity of possession or divest it of its adverse character, although the occupant may believe that he is thereby acquiring the true title. Ragan, C., dissenting. *Oldig* v. *Fisk*, 53 Neb. 156 (73 N. W. Rep. 661). Interruption of an adverse possession based on a claim that the property had been protected by a substantial inclosure for a time longer than the statutory period, is not shown by proof of occasional temporary destruction of portions of the inclosure which were repaired within a reasonable time in each instance. *Baldwin* v. *Durfee*, 116 Cal. 625 (48 Pac. Rep. 724). Title by adverse possession is not acquired by an adverse claimant, who, before the expiration of the prescriptive period, transferred his possession to another for whom he afterwards acted as agent. *Blomberg* v. *Montgomery*, 69 Minn. 149 (72 N. W. Rep. 56). The running of the statute of limitations in favor of a person in the adverse possession of land is not suspended by the death of the opposing claimant. *Davis* v. *Threlkeld*, 58

Kan. 768 (51 Pac. Rep. 226). Pa. Pub. Laws, 1859, p. 6089, construed and applied—interruption of the running of the statute. *Hasson* v. *Klee*, 181 Pa. St. 117 (37 Atl. Rep. 184).

Sec. 76. Public property. Until a patent for public lands has been issued no adverse possession can begin to run in favor of or against any one. *Stevens* v. *Moore*, 116 Ala. 397 (22 So. Rep. 542); *Stringfellow* v. *Tennessee Coal, Iron & R. Co.*, 117 Ala. 250 (22 So. Rep. 997). This rule is made a statutory provision in Florida, by Fla. Laws 1872, ch. 1869. *Hagan* v. *Ellis*, 39 Fla. 468 (22 So. Rep. 727; 68 Am. St. Rep. 167). Title to land dedicated to a public use cannot be acquired by adverse possession. *Home for Care of the Inebriate* v. *City & Co. of San Francisco*, 119 Cal. 584 (51 Pac. Rep. 950). Where lands have been granted by the public to be held as "commons" for the people of a specified community, a *quasi* municipal corporation created by the state having power to divide them into lots and lease them for fifty years, the state alone having power to segregate or convey the lands, it is held that title to such lands cannot be acquired by adverse possession. *President of Kaskaskia* v. *McClure*, 167 Ill. 23 (47 N. E. Rep. 72). One who seeks to defeat proceedings by a city to condemn and open a street by alleging adverse possession of the land by herself and others under whom she claims for twenty years, must show a privity of title with such other owners and clearly allege that the ground has not been previously dedicated to the public for a street. *City of Baltimore* v. *Coates*, 85 Md. 581 (37 Atl. Rep. 18). Ky. Gen. Stat. ch. 71, art. 5, applied—adverse possession of street. *James* v. *City of Louisville*, Ky. (40 S. W. Rep. 912). In Michigan it is held that the title to land laid out for a public alley, may be acquired by adverse possession. *Vier* v. *City of Detroit*, 111 Mich. 646 (70 N. W. Rep. 189). Under N. C. Code, § 189, the state may be barred by 30 years' adverse possession, which need not be continuous nor need there be any connection between the tenants. *Walden* v. *Ray*, 121 N. C. 237 (28 S. E. Rep. 298). In Oregon it is held that title may be acquired to a public highway by adverse possession for the prescriptive period. *Grady* v. *Dundon*, 30 Or. 388 (47 Pac. Rep. 915). Construing Tex. Rev. Stat. 1895,

art. 8351, it is held that adverse possession may exist against a county as to lands which are not used for road, street, sidewalk or some public use. *Johnson* v. *Llano Co.*, 15 Tex. Civ. App. 421 (39 S. W. Rep. 995). In Minnesota, a recent statute which does not affect pending actions, provides that title to "any public street, highway, alley, public square or levee" cannot be acquired by adverse possession. Laws 1899, p. 65. In Utah, title "to any lands held by any town or city or the corporate authorities thereof," cannot be acquired "by adverse possession thereof for any length of time whatsoever." Laws 1899, p. 55.

Sec. 77. Landlord and tenant—Tenants in common. One who takes possession of real estate as the tenant of another cannot hold said real estate adversely to his lessor without first having actually or constructively surrendered the premises to him. *Perkins* v. *Potts*, 52 Neb. 110 (71 N. W. Rep. 1017); *Perkins* v. *Potts*, 58 Neb. 444 (78 N. W. Rep. 986). A tenant in common in possession, who has once acknowledged his cotenant's title, cannot claim to hold adversely until he has brought home to his cotenant knowledge of the adverse nature of his holding, unless his exclusive use and enjoyment has been so long continued as to justify a finding of acquiescence on the part of the other tenants. *Saladin* v. *Kraayvanger*, 96 Wis. 180 (70 N. W. Rep. 1113). The possession of a tenant in common becomes adverse as against his cotenant when the latter has notice of the former's claim that he is holding as absolute owner; but the mere possession of a cotenant, although continued for the prescriptive period, is not sufficient notice to a cotenant that the possessor claims the whole. *Weshgyl* v. *Schick*, 113 Mich. 22 (71 N. W. Rep. 323). The possession of the common estate by one holding under a deed executed by all of several cotenants except one, which purports to convey the whole estate, is not adverse to the interests of the other cotenant so long as his title is recognized by such grantee. *Van Ormer* v. *Hurley*, 102 Ia. 150 (71 N. W. Rep. 241). It is held that as a general principle, the minority of a tenant in common will protect the interest of the other tenants in common from the operation of the statute of limitations; but when adults and infants are ten-

ants in common of land the fact that presumption of a deed arising from adverse possession cannot prevail against the infants, cannot be interposed by the other tenants in common. *Garrett* v. *Weinberg*, 48 S. C. 28 (26 S. E. Rep. 8). The court say: "Statutes of limitations and presumptions arising from lapse of time are very different in their natures, and we see no reason why they both may not exist at the same time, even when the statute prescribes twenty years as the time necessary to sustain the defense of adverse possession. *Wadsworthville* v. *McCully*, 11 Rich. Law 430; *Trustees* v. *Jennings*, 40 S. C. 183 (18 S. E. Rep. 257, 891; 42 Am. St. Rep. 854)." Particular evidence held sufficient to show an adverse holding by cotenants. *Hutson* v. *Hutson*, 139 Mo. 229 (40 S. W. Rep. 886). See Tenants in common.

Sec. 78. Vendor and vendee—Mortgagor and mortgagee—Husband and wife. Possession by a vendee under a land contract, is not adverse until he has either complied with its terms, or in some way given notice to his vendor or his assignee, that he claims to hold in hostility thereto. *Burke* v. *Douglass*, 115 Mich. 197 (73 N. W. Rep. 133). Citing, In re Department of Public Parks, 78 N. Y. 566; *Heermans* v. *Schmaltz*, 7 Fed. 577; *Furlong* v. *Garrett*, 44 Wis. 112; *Brown* v. *King*, 5 Metc. (Mass.) 173; *Miller* v *Larson*, 17 Wis. 624; *Adams* v. *Fullam*, 43 Vt. 592; 1 Am. & Eng. Enc. Law (2d Ed.) 799. One who holds under an assignment of a contract for the purchase of land, does not hold adversely to the vendor. *Laraway* v. *Zenor*, 100 Ia. 181 (69 N. W. Rep. 416). The possession of land under an executory contract of purchase is not adverse to the vendor so long as the purchase money is not paid. *Peadro* v. *Carriker*, 168 Ill. 570 (48 N. E. Rep. 102). A donee of lands who goes into possession under claim of ownership begins an adverse possession, as against his donor. *Schafer* v. *Hauser*, 111 Mich. 622 (70 N. W. Rep. 136; 66 Am. St. Rep. 403; 35 L. R. A. 835). Under Cal. Code Civ. Proc. § 346, it is held that where a grantor in an absolute deed, claimed by him to be a mortgage, fails to bring any action against his grantee for a period of five years after such grantee has asserted title in himself and otherwise manifested an adverse holding, he loses all remedy

whether the debt or obligation secured by the mortgage has been paid or not. *Peshine* v. *Ord*, 119 Cal. 311 (51 Pac. Rep. 536; 63 Am. St. Rep. 181). A husband continuing in possession of his wife's land after divorce from her will be considered as holding adversely to her, and she has the burden of showing that he holds in recognition of her title. *Ferring* v. *Fleischman*, Tenn. (39 S. W. Rep. 19). A husband's possession of his wife's land during the continuance of the marital relation, will not be treated as adverse. *Watt* v. *Watt*, Ky. (39 S. W. Rep. 48). Where a husband executes an invalid deed to his wife of land upon which they are both living, the right of possession passes to the wife and he does not acquire adverse possession by paying the taxes on the premises. *Reagle* v. *Reagle*, 179 Pa. St. 89 (36 Atl. Rep. 191).

Sec. 79. Sale of land in the adverse possession of another. A purchaser at a foreclosure sale, had under a decree foreclosing a mortgage executed by a mortgagor, while the land was in the adverse possession of another, who was not made a party to the proceedings to foreclose, acquires no title as against such adverse claimant. *Probst* v. *Bush*, 115 Ala. 495 (22 So. Rep. 445). In Kentucky, a conveyance of lands held adversely by another is void. *Farmer* v. *Farmer*, Ky. (39 S. W. Rep. 706). Ky. Stat. 1894, § 210, providing "that all sales or conveyances, including those made under execution, of any lands or pretended right or title to same, of which any person at the time of such sale, contract or conveyance had adverse possession, shall be null and void," is held not to apply to a sale by order of a court of equity. *Ward* v. *Edge*, 100 Ky. 757 (39 S. W. Rep. 440). Merely cutting and removing timber at intervals is not of itself such possession as will avoid a deed for champerty. *Rice* v. *West*, Ky. (42 S. W. Rep. 116). Nor is possession by mere accidental inclosure sufficient. *McSpadden* v. *Starrs Mountain Iron Co.*, Tenn. (42 S. W. Rep. 497). Mill. & V. Tenn. Code, §§ 2445, 2449, construed and applied —champertous conveyance. *Curry* v. Williams, Tenn. (38 S. W. Rep. 278). N. Dak. Comp. Laws, § 3303, declaring every grant of real property void "if at the time of the delivery thereof such real property is in the actual posses-

sion of a person claiming under a title adverse to that of the grantor," has no application where the party in possession relies only upon naked possession, which, upon his own showing, has not continued for sufficient time to ripen into title by prescription under the statute. The possession must be by one claiming under a title. *Kreuger* v. *Schultz*, 6 N. Dak. 310 (70 N. W. Rep. 269). In South Dakota, it is provided by statute that one claiming right or title to lands may convey his interest to another although the lands are adversely held by a third party, and such grantee may maintain any action which his grantor could have maintained. Laws 1899, p. 144.

ALIENS.

EPITOME OF CASES.

Sec. 80. Rights of aliens as to real estate—Statutes construed. The provisions of a state statute denying aliens the right to take real estate by inheritance in such state will be construed in subservience to a stipulation in a treaty between the federal government and a foreign country permitting the subjects of the latter to inherit real estate in the United States. The federal government has power to make such a stipulation in a treaty and it does not alter the laws of descent of the state affected by it so as to render them unconstitutional, nor is it an infringement of the right of the state to control its internal policy. *Opel* v. *Shoup*, 100 Ia. 407 (69 N. W. Rep. 560; 37 L. R. A. 583), construing and applying Acts 22nd Gen. Assem. ch. 85 with reference to the treaty between the United States and the king of Bavaria; *Claflin* v. *Claflin*, 102 Ia. 744 (71 N. W. Rep. 210); *Doehrel* v. *Hillmer*, 102 Ia. 169 (71 N. W. Rep. 204), construing and applying the same statute with reference to the treaty between the United States and Prussia; *Adams* v. *Akerlund*, 168 Ill. 632 (48 N. E. Rep. 454), construing and applying the Illinois Laws of 1887, p. 5, with reference to the treaties between the United States and Sweden. Construing Iowa Acts 22nd Gen. Assem. ch. 85

(for provisions of which see Ballards' Law Real Property, Vol. V, § 88), it is held that an alien taking land under a will takes by purchase. *Doehrel* v. *Hillmer*, 102 Ia. 169 (71 N. W. Rep. 204). Ill. Laws, 1887, p. 5; 1891, p. 8, construed and applied—power of aliens to hold and convey lands. *DeGraff* v. *Went*, 164 Ill. 485 (45 N. E. Rep. 1075). Conn. Gen. Stat, § 15 applied—inheritance by an alien. *Crosgrove* v. *Crosgrove*, 69 Conn. 416 (38 Atl. Rep. 219). Burns' Ind. Rev. Stat. (1894) §§ 3382, 3383—ownership of lands by aliens —amended, Ind. Laws 1899, p. 377. Idaho has a new statute as to the rights of aliens and alien corporations to acquire real estate. Laws 1899, p. 70.

See. 81. Power of alien corporations to acquire real estate. Washington Const. art. 2, § 33 (given effect by Gen. Stat. § 1524), provides as follows: "The ownership of lands by aliens other than those who in good faith have declared their intention to become citizens of the United States is prohibited in this state, except where acquired by inheritance, under mortgage or in good faith in the ordinary course of justice in the collection of debts; and all conveyances of land hereafter made to any alien directly, or in trust for such alien, shall be void; *Provided*, that the provisions of this section shall not apply to lands containing valuable deposits of minerals, metals, iron, coal or fire-clay, and the necessary lands for mills and machinery to be used in the development thereof and the manufacture of the products therefrom. Every corporation, the majority of the capital stock of which is owned by aliens, shall be considered an alien for the purposes of this prohibition." Construing this provision, it is held that an alien corporation which has taken a mortgage on lands to secure a loan made by it may acquire title thereto by taking a conveyance of such lands directly from the mortgagor in satisfaction of the debt, without foreclosure; and only the state can question the validity of a title claimed to have been acquired in violation of the statute. Dunbar J., dissenting. *Oregon Mort. Co.* v. *Carstens*, 16 Wash. 165 (47 Pac. Rep. 421; 35 L. R. A. 841). Upon the last point this case is followed in *Goon Gan* v. *Richardson*, 16 Wash. 378 (47 Pac. Rep. 762).

ASSIGNMENTS FOR CREDITORS.

EPITOME OF CASES.

Sec. 82. Constitutionality and construction of statutes. Fla. Laws 1889, ch. 3891, regulating assignments for the benefit of creditors, is constitutional. *Dorr* v. *Schmidt*, 38 Fla. 354 (21 So. Rep. 279). A statute (Me. Rev. Stat. ch. 70, § 33), providing that an assignment dissolves any attachment made within four months preceding the commencement of the assignment proceedings, does not apply to an attachment issued to the enforcement of a mechanic's lien, the assignee taking the property subject to such liens. *Laughlin* v. *Reed*, 89 Me. 226 (36 Atl. Rep. 181). Mont. Comp. Stat., 1887, div. 5, § 226, construed and applied—assignment of a building as personal property—taking possession. *Tuttle* v. *Merchant's Nat. Bank*, 19 Mont. 11 (47 Pac. Rep. 203). Pa. Pub. Laws 1847, p. 278, construed and applied—assignments by failing debtors to prefer creditors subject to the law relating to voluntary assignments. *Mann* v. *Wakefield*, 179 Pa. St. 398 (36 Atl. Rep. 244). U. S. Rev. Stat. § 5057, construed and applied—statute of limitations against action by assignee. *Bowen* v. *Delaware L. & W. R. Co.*, 153 N. Y. 476 (47 N. E. Rep. 907; 60 Am. St. Rep. 667). Ohio Rev. Stat. §§ 6343, 6344—conveyances in contemplation of insolvency—amended, Laws 1898, p. 290.

Sec. 83. Extraterritorial force of assignments and assignment laws. Where a creditor and the assignee do not reside in the state where the assignment is made, and the former participates in proceedings had under the assignment and has placed himself in a position to accept the benefits thereof, he is estopped to question the validity of the assignment, as affecting lands in other states on account of its not conforming with the requirements of such states as to conveyances,

and the courts of the state in which the assignment is made may restrain him from violating his estoppel by actions in the other states. *Kendall* v. *McClure Coke Co.*, 182 Pa. St. 1 (37 Atl. Rep. 823; 61 Am. St. Rep. 688). "Insolvent laws of one state cannot discharge the contracts of citizens of other states, because they have no extraterritorial operation, and consequently the tribunal sitting under them, unless in cases where a citizen of such other state voluntarily becomes a party to the proceeding, has no jurisdiction in the case. Legal notice cannot be given, and consequently there can be no legal obligation to appear, and, of course, there can be no legal default." *Scamman* v. *Bonslett*, 118 Cal. 93 (50 Pac. Rep. 272; 62 Am. St. Rep. 226). Citing, *Baldwin* v. *Hale*, 1 Wall. 223; *Rhodes* v. *Borden*, 67 Cal. 7 (6 Pac. Rep. 850); *Bedell* v. *Scruton*, 54 Vt. 493; *Bean* v. *Loryea*, 81 Cal. 151 (22 Pac. Rep. 513).

Sec. 84. Validity of assignments. The fact that an assignment reserves property from its operation, does not render it void as to property conveyed. *Mansur & Tibbitts Imp. Co.* v. *Wood*, 63 Ark. 362 (38 S. W. Rep. 898). A deed of assignment will not be held invalid on account of the omission of property possessing no value, and which if included in the conveyance would prove to be a burden and expense to the trust instead of a profit or benefit. And a debtor may impose upon his creditors the condition that those who participate in the fund shall release him from the residue of their demands, although the deed give preferences. *Long* v. *Meriden Brittania Co.*, 94 Va. 594 (27 S. E. Rep. 499). Fla. Laws 1889, ch. 3891, prohibits both preferential and partial assignments; and an assignment by a partnership firm of only the joint or partnership property and not embracing the individual property of the members of the firm, is void upon its face. *Sheppard* v. *Reeves*, 39 Fla. 53 (21 So. Rep. 774). Particular conveyances held void under Iowa Code, § 2115, declaring that no general assignment shall be valid unless made for the benefit of all creditors. *Elwell* v. *Kimball*, 102 Ia. 720 (69 N. W. Rep. 286). Applying Va. Code, § 2442, it is held that a trust deed for the benefit of creditors is not fraudulent because it provides for the trustee carrying

on the debtor's business and does not in express terms provide for a sale by the trustee of the property conveyed, when required so to do by the creditors secured. *Taylor* v. *Mahoney*, 94 Va. 508 (27 S. E. Rep. 107).

Sec. 85. Formal requisites—Construction. Applying the statutory provision of Minnesota, that a widow's right to one-third in the real estate of her husband, is "subject in its just proportion, with other real estate, to the payment of such debts of the deceased as are not paid from the personal estate," it is held that a married man's wife need not join with him in the deed of assignment of all his nonexempt property for the benefit of his creditors; and deeds by the assignee in the execution of such trust conveyed complete title, and the wife has an inchoate interest only in the land, if any, which remains undisposed of after the trust is fully executed. *Merrill* v. *Security Trust Co.*, 71 Minn. 61 (73 N. W. Rep. 640). A debtor's conveyance of property absolutely to a trustee to be sold for the payment of his debts named and preferred in it, will be treated as an assignment for the benefit of creditors and not as a mortgage. *Tuttle* v. *Merchants' Nat. Bank*, 19 Mont. 11 (47 Pac. Rep. 208). In construing deeds of assignment for the benefit of creditors, the ordinary rules governing the construction of contracts between parties, apply. *Eau Claire Grocery Co.* v. *Hubbard*, 97 Wis. 661 (73 N. W. Rep. 570). A reservation to the assignor of "a homestead exemption such as a *bona fide* housekeeper with a family would take under the statute laws of Kentucky," does not give him a right to a homestead out of the assigned property where he is not entitled to one under the statute. *Russell* v. *Russell's Assignee*, ' Ky. (38 S. W. Rep. 1041). Particular instrument construed and held to be an assignment by partners. *Eau Claire Grocery Co.* v. *Hubbard*, 97 Wis. 661 (73 N. W. Rep. 570).

Sec. 86. Preference of creditors. The validity of an assignment is not affected by the previous conveyance of property by the assignor before the assignment was in contemplation. *Lazarus* v. *Camden Nat. Bank*, 64 Ark. 322 (42 S. W. Rep. 412). Where a debtor has first determined to prefer

some of his creditors by a deed of trust which he fully executed, it is not invalidated by his immediately executing a general assignment on account of advice given him by his attorney when executing the deed of trust. *Pollock* v. *Sykes*, 74 Miss. 700 (21 So. Rep. 780). See opinion for collation and review of the authorities. Construing and applying Hill's Ann. Or. Laws, § 8178, rendering invalid an assignment by an insolvent for the benefit of his creditors "unless made for the benefit of all his creditors in proportion to the amount of their respective claims," it is held that an assignment is not rendered invalid by the execution of mortgages by the assignor to particular creditors immediately prior to the execution of the assignment, where such mortgages were given to secure *bona fide* debts, accepted in good faith and at the time of their execution the assignor did not contemplate the making of the assignment. *Inman, Poulsen & Co.* v. *Sprague*, 30 Or. 321 (47 Pac. Rep. 826). The court say: "In *Perry* v. *Vezina*, 63 Ia. 25 (18 N. W. Rep. 657), a chattel mortgage executed three hours before a general assignment, was held not to invalidate the assignment, it appearing that the debtor did not contemplate making it when the mortgage was made. Indeed, in all cases of this character the true guiding principle of the decision is the intention of the parties. If the instrument giving a preference is executed and received in good faith, with the intention of paying or securing a *bona fide* debt, and not as a part of a general assignment under the statute, it is valid, however near its execution may be in point of time to a subsequently executed assignment. But when an insolvent debtor has formed the determination to voluntarily dispose of all his property for the benefit of his creditors, and has entered upon the performance of that determination, the number or character of the instruments used by him to accomplish his purpose is wholly immaterial. The law will regard all his acts having for their object the accomplishment of this purpose as parts of one single transaction, and will read into the assignment, when executed, all prior acts of the debtor having reference to the disposition of his property, and, if any preferences are shown to have been given by him to one creditor over another, the assignment will be declared void under the statute. *Nelson* v. *Garey*, 15 Neb. 531 (19 N. W. Rep. 680);

Preston v. *Spaulding*, 120 Ill. 208 (10 N. E. Rep. 908); *Benham* v. *Ham*, 5 Wash. 128 (31 Pac. Rep. 459; 34 Am. St. Rep. 851); *Root* v. *Potter*, 59 Mich. 506 (26 N. W. Rep. 682); *Root & Co.* v. *Harl*, 62 Mich. 420 (29 N. W. Rep. 29); *Burnham* v. *Haskins*, 79 Mich. 35 (44 N. W. Rep. 341); *Lumber Co.* v. *Ott*, 142 U. S. 622 (12 Sup. Ct. Rep. 318); *Perry* v. *Holden*, 22 Pick. 269."

Construing and applying Tenn. Laws, 1881, ch. 121, providing that trust deeds, etc., taken within three months of a general assignment and in contemplation of it, shall be void, it is held that such deeds are not invalid unless made in contemplation of a valid assignment, which is executed within three months, and they are not affected by an ineffectual attempt to make a general assignment within that time. *Jones* v. *Cullen*, 100 Tenn. 1 (42 S. W. Rep. 873). R. I. Pub. Stat. ch. 237, § 15, as amended by Pub. Laws 1882, ch. 274, construed and applied—validity of preferences made within 60 days—rights and duties of assignee. *Colt* v. *Sears Commercial Co.*, 20 R. I. 64 (37 Atl. Rep. 311); *Colt* v. *Sears Commercial Co.*, 20 R. I. 323 (38 Atl. Rep. 1056).

Sec. 87. Rights of creditors. In a contest between the creditors of an assigning debtor, they should contribute ratably to the satisfaction of his wife's dower interest. *Hendrick* v. *McElroy*, Ky. (38 S. W. Rep. 846). A creditor setting aside a deed of trust, executed for the benefit of creditors, under Va. Code, § 2460, as to certain debts secured thereby, does not acquire a prior lien as against creditors whose debts are valid. *Craig* v. *Hoge*, 95 Va. 275 (28 S. E. Rep. 317). Where real estate was sold by a corporation assignee discharged of liens, not under its general power as assignee, but by virtue of an order of court, it is held that the assignee received and held the proceeds in trust for the lien creditors, in the order of the priority of their liens; and as to any balance after the payment of liens, for the general creditors. The creditors whose liens were discharged were required to look to the fund and interest on their claims ceased on the date of the confirmation of the sale. *In re Wilhelm's Estate*, 182 Pa. St. 281 (37 Atl. Rep. 819). In proceedings under a general assignment for the benefit of creditors, the

court may properly permit a mortgage creditor who has not filed his claim to bring a separate action to foreclose his mortgage on a portion of the assigned property. Hoyt, C. J., dissenting. *Penn. Mut. Life Ins. Co.* v. *Fife*, 15 Wash. 605 (47 Pac. Rep. 27).

Sec. 88. Title, rights and liabilities of an assignee. An assignee in bankruptcy takes only the title which his assignor had at the time he is adjudged bankrupt, and can convey no better title. *Lockwood* v. *Noble*, 113 Mich. 418 (71 N. W. Rep. 856). He does not occupy the position of an innocent purchaser for value. *Walker* v. *Walker's Assignee*, Ky. (41 S. W. Rep. 815). An assignee stands in the place of the insolvent, and, in the absence of fraud takes his estate subject to all equities, liens and incumbrances, whether created by operation of law or by the act of the insolvent which had a valid existence against the property in the hands of the insolvent. *Laughlin* v. *Reed*, 89 Me. 226 (36 Atl. Rep. 131). An assignee for the benefit of creditors is the owner of his assignor's real estate; and upon selling it, is subject to the liabilities of a grantor in regard to the payment of taxes as provided by Wyoming Laws 1888, ch. 69, § 8. The claim of the state for taxes against the assignor's property, which is made a perpetual lien by statute, is not affected by Sess. Laws 1890, p. 87, § 18, providing the manner in which the assignee may discharge incumbrances and the duties of lienholders as to the enforcement of their claims. *Carey* v. *Foster*, Wyo. (51 Pac. Rep. 206). An assignee who recognizes the validity of a previous mortgage executed on the property by his assignor, by a sale of the property subject to the mortgage, cannot afterwards avoid it. *Colt* v. *Sears Commercial Co.*, 20 R. I. 64 (37 Atl. Rep. 811). An assignee of an insolvent lessee, who takes possession of the lease-hold before the landlord levies any distress warrant, has priority over the latter's claim for rent, and such claim stands as the claim of any other creditor. *Rand* v. *Francis*, 168 Ill. 444 (48 N. E. Rep. 159). He may foreclose a mortgage give to his assignor. *Thompson* v. *Browne*, 10 S. Dak. 344 (73 N. W. Rep. 194). He may maintain an action to set aside a fraudulent conveyance of his assignor. *Applegarth* v. *Wagner*, 86 Md. 468 (38

Atl. Rep. 940). Upon an assignment by a debtor to an assignee, under the insolvent debtor's act, of real estate which has been held by the assignor under a written lease, the terms of which have not expired, the assignee has a reasonable time in which to determine whether or not he will adopt the terms of the lease, and whether or not such leasehold can be made available for the benefit of creditors. Where he adopts the terms of the lease he is chargeable with rent for the time he occupies the premises. *Rand* v. *Francis*, 168 Ill. 444 (48 N. E. Rep. 159). Where an assignee has property bid off at his sale in the name of another without the latter's knowledge or consent, and by a subsequent speculation with him and others realizes an advance on the property, he will be held chargeable to the estate for the profits so realized. *In re Allison's Estate*, 188 Pa. St. 555 (88 Atl. Rep. 1086). A defeasible fee held by a debtor may be sold at his assignee's sale. *Trimble* v. *Shawhan*, Ky. (41 S. W. Rep. 546). Ohio Rev. Stat. § 6351—sale by assignee—payment of liens and distribution of proceeds—amended, Laws 1898, p. 182.

Sec. 89. Right of purchaser at an assignee's sale to assail prior incumbrance for fraud. The grantee of a purchaser at an assignee's sale in insolvency proceedings cannot avoid a mortgage placed upon the property before the assignment by the insolvent debtor, upon the ground of fraud or want of consideration in the inception of the mortgage, where the assignee advertises the property for sale subject to the mortgage, accepts bids on such condition, and by consent of the court sells accordingly. *New Prague Milling Co.* v. *Schreiner*, 70 Minn. 125 (72 N. W. Rep. 968). The court say: "The creditors of the insolvent are not complaining, and, if the mortgage is to be avoided, it would seem a matter of justice that they should be the ones to have the proceeds, and not a mere purchaser who took with notice of the incumbrance and that the property was sold subject to it. It seems to us as a sound principle of public policy that such purchasers at an assignee's sale ought not to be permitted to speculate upon claims of this kind; that the assignee should not allow the interests or rights of creditors to be jeopardized by an uncertain method of notice of sale, whereby he might sell valuable

property of the insolvent for a mere trifle, with fraudulent incumbrances thereon, and then let the purchaser avoid the sale and enjoy the proceeds, with but little consideration paid therefor, and creditors be thereby deprived of their just dues. From the facts appearing in this case it seems clear that the assignee elected to treat the mortgage as a valid lien notwithstanding its fraudulent character as to the creditors of the mortgagor, and, having thus affirmed it, it stands good as between the parties to it. See *Freeland* v. *Freeland*, 102 Mass. 477; *Twite* v. *Stephens*, 98 Mass. 307; *Bean* v. *Brackett*, 84 N. H. 122; *Taylor* v. *Taylor*, 74 Me. 582. The purchaser at the assignee's sale under the notice of sale took the land charged with the incumbrance of the mortgage as expressly as though he had the payment of the debt himself. While not personally liable for the debt, the land is chargeable with the incumbrance, and he cannot be allowed to set up a defense as to its validity. Jones, Mortg. (4th Ed.), § 786."

BONA FIDE PURCHASER.

EPITOME OF CASES.

Sec. 90. As to what constitutes—General principles. A purchaser of land has a right to rely upon a recorded title and takes the land free from any other equities of which he has no notice. *Hume* v. *Hopkins*, 140 Mo. 65 (41 S. W. Rep. 784). Where a claim to real estate can be sustained only upon the ground that the person asserting it is a subsequent purchaser in good faith such person is required to show affirmatively that he purchased without notice of the equities of another, and relying upon the apparent ownership of his grantor. *Pfund* v. *Valley Loan & T. Co.*, 52 Neb. 473 (72 N. W. Rep. 480). One claiming protection against prior equities as a *bona fide* purchaser must show that he acquired his title and parted with his money before he received notice of the equity of his adversary. *Peay* v. *Seigler*, 48 S. C. 496

(26 S. E. Rep. 885; 59 Am. St. Rep. 781). A *bona fide* mortgagee has all the rights of a *bona fide* purchaser. *Kentucky Bldg. & Loan Ass'n* v. *Kister*, Ky. (41 S. W. Rep. 298). One who takes a mortgage to secure a pre-existing debt is not a *bona fide* purchaser, but one who takes a conveyance in satisfaction of a pre-existing debt is a *bona fide* purchaser. *Adams* v. *Vanderbeck*, 148 Ind. 92 (45 N. E. Rep. 645; 47 N. E. Rep. 24; 62 Am. St. Rep. 497). Where a deed of trust is given to secure a debt, in consideration of a definite extension of the time of its maturity, the grantee will be treated as a *bona fide* purchaser for value as to prior equities of which he had no notice. *Randolph* v. *Webb*, 116 Ala. 185 (22 So. Rep. 550). Ga. Code § 5855, construed and applied—right of *bona fide* purchaser in possession for four years to relief from judgment liens. *Hale* v. *Robertson*, 100 Ga. 168 (27 S. E. Rep. 987).

Sec. 91. As to what constitutes—Particular cases. A purchaser of negotiable bonds, issued by a corporation and secured by a trust deed of its property, who has no notice of any defect in its title, will be treated as a *bona fide* purchaser, as against a creditor of the grantor of such corporation who has the conveyance to it set aside as fraudulent. *Lebeck* v. *Ft. Payne Bank*, 115 Ala. 447 (22 So. Rep. 75). Where it is agreed between a plaintiff in a divorce proceeding and his attorney, that the latter is to have one-half of the alimony recovered, for his fee, a mortgage taken by such attorney, after the decree, on land awarded the plaintiff as alimony, to secure the performance of such contract, does not make the attorney a *bona fide* purchaser, as against the defendant in the divorce proceedings, who afterwards has the decree for alimony set aside for fraud. *Klaes* v. *Klaes*, 103 Ia. 689 (72 N. W. Rep. 777). Where an original progenitor of a manufacturing enterprise, who agreed with the citizens of a town to erect a manufacturing plant of a certain capacity in consideration of the donation of certain lands and money by them, subsequently as a stockholder in a corporation organized to carry out such agreement, takes a mortgage upon the donated real estate to secure the repayment of money claimed to have been advanced by him, he is not a *bona fide* purchaser, but

takes subject to the conditions upon which title to the land was to be acquired. *Fay & Egan Co.* v. *Brown*, 96 Wis. 484 (71 N. W. Rep. 895). One purchasing land and taking a quitclaim deed therefor from a former owner while the land is in the adverse possession of another, against whose title there is nothing inconsistent upon record, is not a *bona fide* purchaser as to such adverse claimant. *Jones* v. *Brenizer*, 70 Minn. 525 (73 N. W. Rep. 255). Particular case in which one is held to be a *bona fide* purchaser as to a prior claim of homestead. *Weaver* v. *Saffold*, 101 Ga. 150 (28 S. E. Rep. 118).

Sec. 92. Purchasers at execution or judicial sales. A judgment creditor who purchases in good faith at a sale made under his judgment, will be treated as a *bona fide* purchaser. *Sternberger* v. *Ragland*, 57 O. St. 148 (48 N. E. Rep. 811). Citing, *Foorman* v. *Wallace*, 75 Cal. 552; *Evans* v. *McGlasson*, 18 Ia. 150; *Butterfield* v. *Walsh*, 21 Ia. 97 (89 Am. Dec. 557). A stranger who in good faith purchases at a judicial sale, made under a judgment regular on its face, will be treated as a *bona fide* purchaser, and the sale is not avoided by a subsequent reversal or setting aside of the judgment. *Branley* v. *Dambly*, 69 Minn. 282 (71 N. W. Rep. 1026). The assignee of a certificate of sale issued to a purchaser under a judicial judgment or decree, is not a *bona fide* purchaser. *Bruschke* v. *Wright*, 166 Ill. 183 (46 N. E. Rep. 813; 57 Am. St. Rep. 125). An assignee or vendee of one who purchases under an erroneous decree in his own favor, stands in the position of his vendor, and a subsequent reversal defeats his title. Such assignee or vendee is not entitled to protection as a *bona fide* purchaser without notice and for value. *Singly* v. *Warren*, 18 Wash. 434 (51 Pac. Rep. 1066; 63 Am. St. Rep. 896). Citing, *Bryant* v. *Fairfield*, 51 Me. 145; *Marks* v. *Cowles*, 61 Ala. 299; *Corwith* v. *Bank*, 15 Wis. 817. One who purchases land at a foreclosure sale in good faith, pays the price, and takes a certificate of sale, is not affected by the subsequent notice of adverse rights though received before the execution of the sheriff's deed. *Duff* v. *Randall*, 116 Cal. 226 (48 Pac. Rep. 66; 58 Am. St. Rep. 158). Applying Tex. Laws 1876, p. 114, § 85, providing that

an executor or administrator's conveyance shall vest in the purchaser the right and title that the testator or intestate had, it is held that a purchaser at an administrator's sale holding under a conveyance of "all the right, title and interest" of the estate in certain described lands, without warranty, is a *bona fide* purchaser for value, as against the holder of the unrecorded title. *White* v. *Dupree*, 91 Tex. 66 (40 S. W. Rep. 962). Particular evidence held competent and sufficient to show that one claiming as a purchaser under an execution sale was not a *bona fide* purchaser. *Cottle* v. *Simon*, 158 N. Y. 403 (47 N. E. Rep. 815).

Sec. 93. Pendente lite purchasers. A defendant in an action for partition, who purchases the interest of other defendants having notice that the plaintiffs were claiming advancements had been made to his grantors, takes the land subject to set off on account of these advancements. *Finch* v. *Garrett*, 102 Ia. 381 (71 N. W. Rep. 429). Applying Cal. Civ. Code, §§ 2925, 2950, it is held that a purchaser from one holding under an absolute deed which is rendered a mortgage by his separate defeasance, the latter not being recorded, without notice that the grant was intended as a mortgage, acquires the title free from the equity of the original grantor; and the fact that foreclosure proceedings have been begun under such deed, does not constitute constructive notice to such purchaser where no lis pendens has been filed, in view of Code Civ. Proc. § 726, providing that in foreclosure cases no lien is created by the proceedings until the docketing of a deficiency judgment. *Carpenter* v. *Lewis*, 119 Cal. 18 (50 Pac. Rep. 925). See Liens.

Sec. 94. Purging equities—Knowledge sufficient to put one on inquiry. A *bona fide* purchaser may transfer a good title to one having notice of equities affecting it. *Paul* v. *Kerswell*, 60 N. J. L. 278 (37 Atl. Rep. 1102); *Buck* v. *Foster*, 147 Ind. 530 (46 N. E. Rep. 920; 62 Am. St. Rep. 427). Where a fraudulent grantee has been deprived of his title by an execution sale, he may acquire a good title by a subsequent purchase from the purchaser at such sale. *Dimock* v. *Ridgeway*, 169 Mass. 526 (48 N. E. Rep. 338).

One purchasing from a purchaser at an administrator's sale collusively and fraudulently made, acquires a good title where he had no notice of any irregularity in the administrator's sale or any information sufficient to put him on inquiry. *Adler-Goldman Commission Co.* v. *Clemons*, 64 Ark. 197 (41 S. W. Rep. 417). One having notice of a license affecting land, who purchases from one who had no notice of it, takes the land free from the license. *Buck* v. *Foster*, 147 Ind. 530 (46 N. E. Rep. 920; 62 Am. St. Rev. 427).

The fact that one has knowledge that his vendor has purchased real estate at a trustee's sale and is selling it at a good profit, does not charge the vendee with notice of a conspiracy between the trustee and her vendor to defraud the estate, the price paid to the trustee not being so inadequate as, in itself, to indicate fraud. Martin & Vann, JJ., dissenting. *Anderson* v. *Blood*, 152 N.Y. 285 (46 N. E. Rep. 498). Particular facts held sufficient to put one on inquiry. *Truss* v. *Miller*, 116 Ala. 494 (22 So. Rep. 868). Particular conveyance held sufficient to charge a purchaser with notice of the fraudulent character of a prior grantor's conveyance. *Arnold* v. *Hoschildt*, 69 Minn. 101 (71 N. W. Rep. 829). Particular facts held insufficient to charge a subsequent grantee with knowledge of a vendor's lien reserved by parol. *Yancey* v. *Blakemore*, 95 Va. 268 (28 S. E. Rep. 886).

BOUNDARIES.

EPITOME OF CASES.

Sec. 95. Agreements fixing. Lines between adjoining owners may be established by their agreement and acts in reference thereto, althought they have not continued for the prescriptive period. *St. Bede College* v. *Weber*, 168 Ill. 324 (48 N. E. Rep. 165). The existence of a disputed boundary is sufficient to give validity to a parol agreement fixing the dividing line between adjoining owners without there being an actual overlapping of their boundaries shown by the paper

titles of the claimants. *Gayheart* v. *Cornett*, Ky. (42 S. W. Rep. 730). Where adjoining owners who are ignorant as to the location of the true boundary line between them, fix and agree upon a permanent boundary line in accordance with which agreement possession is taken, such agreement is binding upon the parties to it and all persons claiming through or under them. *Ernstring* v. *Gleason*, 137 Mo. 594 (39 S. W. Rep. 70); *Elmore* v. *Davis*, 48 S. C. 388 (26 S. E. Rep. 680).

Sec. 96. Establishing boundaries by erection of fences and buildings. In determining the boundary of a city lot upon an alley, a city may be bound by the location and maintenance of fences and acquiscence therein for more than twenty-five years. *City of Decatur* v. *Niedermeyer*, 168 Ill. 68 (48 N. E. Rep. 72). Acquiescence in the location of a division fence as a boundary line for more than thirty years will establish it as a true line, although such location does not agree with the survey referred to in the deeds under which the adjoining owners hold. *Palmer* v. *Dosch*, 148 Ind. 10 (47 N. E. Rep. 176). A landowner, ignorant of his true boundary, does not, by merely building a fence, estop himself from setting it over on the true line, unless the adjoining owner has acquired title to the strip left next to his lot by adverse possession. *Beecher* v. *Farris*, 112 Mich. 584 (70 N. W. Rep. 1106). Building a fence by one adjoining owner within the true boundary upon what he supposes to be the true line, there being no agreement that the fence is to constitute the boundary, does not establish it as the boundary, although the other adjoining owner makes some slight improvements on the outlying strip, in reliance upon the fence being the boundary. *Iverson* v. *Swan*, 169 Mass. 582 (48 N. E. Rep. 282). Where the owner of a city lot, who makes a particular location of its boundaries, by erecting a building covering the entire width of the lot, subsequently makes a mortgage upon the premises, which contains a description by metes and bounds, embracing all the lot except a strip about two inches wide on each side, one acquiring title under the mortgage takes the entire lot as covered by the building, as against the mortgagor and his heirs. *Katz* v. *Kaiser*, 154 N. Y. 294

(48 N. E. Rep. 582). Under Me. Rev. Stat. ch. 18, § 95, when the bounds of a street cannot be made certain by either records or monuments, a fence which has existed in the same place for more than forty years, is to be deemed the true bounds of the street. *Bradford* v. *Hume*, 90 Me. 288 (88 Atl. Rep. 148).

Sec. 97. Establishing boundaries by acquiescence and estoppel. A city may acquiesce in the boundary of a street so as to be estopped to deny it. *City of Joliet* v. *Werner*, 166 Ill. 84 (46 N. E. Rep. 780). The fact that a boundary line erroneously established by a survey has been acquiesced in for many years, does not estop one injuriously affected by the error, from asserting the true line, as against one who had equal advantage with him. *Ward* v. *Dean*, 69 Minn. 466 (72 N. W. Rep. 710). The question as to whether a certain boundary line has been established by the acquiescence of adjoining owners, is a question of fact to be determined by the jury. *Lourance* v. *Goodwin*, 170 Ill. 890 (48 N. E. Rep. 908). A landowner is not estopped to assert the true line between his land and an adjoining lot by his acquiescence in encroachments made by the other proprietor, without reference to any agreement to settle the boundary line of the true location of which they were both ignorant. *Jordan* v. *Ferree*, 101 Ia. 440 (70 N. W. Rep. 611). Where the evidence shows the location of a boundary line by adjoining owners with the obvious intention of making it the true line, which is acquiesced in for more than thirty years, it becomes binding upon them and their privies. *Welton* v. *Poynter*, 96 Wis. 846 (71 N. W. Rep. 597). Where the boundaries of land conveyed are fixed by a definite description in the deed, they cannot be extended by a previous parol understanding between the parties as to where the division line would be, which is acquiesced in by them to the extent of a temporary use, but not followed by the erection of any distinctive land marks. *De Long* v. *Baldwin*, 111 Mich. 466 (69 N. W. Rep. 831). For application of the principles of estoppel to particular boundary case, see *Phinney* v. *Campbell*, 16 Wash. 208 (47 Pac. Rep. 502).

Sec. 98. Proceedings to establish boundaries. As to the admissibility of parol evidence to locate boundaries, see *Broaddus* v. *Eubanks*, Ky. (38 S. W. Rep. 134). It is competent to show by parol testimony that by mistake of surveyor or draftsman, the calls for course and distance incorporated in a deed or grant, are different from those established by previous or contemporary running by the parties or their agents. *Higdon* v. *Rice*, 119 N. C. 623 (26 S. E. Rep. 256). Where the evidence is conflicting, the finding of a trial court as to the location of the division line will not be disturbed. *Ponet* v. *Wills*, Cal. (48 Pac. Rep. 488). Where the issues in an action involve only the establishment of a corner and boundary line common to four sections, to locate which surveyors were commissioned who reported the location of such corner and lines and also the quarter section corners, it is held that a judgment confirming the report and establishing the lines and corners in dispute, does not affect a quarter section corner previously established by the general government and recognized by all the parties interested. *Muecke* v. *Barrett*, 104 Ia. 418 (73 N. W. Rep. 880). Me. Rev. Stat., ch. 3, § 67, construed and applied—proceedings to establish boundaries between adjoining towns—conclusiveness as to private owners. *Whitcomb* v. *Dutten*, 89 Me. 212 (36 Atl. Rep. 67). N. C. Laws 1893, ch. 22, construed and applied—action to establish boundaries—evidence—constructive possession. *Basnight* v. *Meekins*, 27 S. E. Rep. 992).

Sec. 99. Rules for determining boundaries—Locating lost corners. In a contest between two grantees of a common grantor, the junior grantee will not be allowed to claim beyond an agreed boundary line of which he had notice when he purchased. *Harding* v. *Wright*, 138 Mo. 11 (39 S. W. Rep. 456). Where a grant is located by contemporaneously marked lines, they govern and control its boundary and fix the location so as to supercede other descriptions. *Deaver* v. *Jones*, 119 N. C. 598 (26 S. E. Rep. 156). As a general rule, all disputes as to the boundaries of land are governed by the United States surveys unless there is some statute of the state to the contrary; and the United States statutes makes the field notes and plats of the original sur-

veyor the primary and controling evidence of boundary. *Taylor* v. *Fomby*, 116 Ala. 621 (22 So. Rep. 910). Where a fence and piling, erected below high water mark by the owner of one of them, has been acquiesced in and recognized in conveyances to its extent, as a part of the dividing line between two wharf lots on a concave shore, so much of the boundary will be regarded as established, and the remainder of the boundary will be fixed by drawing a straight line from the point to which it is established perpendicular to a straight line drawn across the mouth of the bend on which the lots are situated. *Lowndes* v. *Wicks*, 69 Conn. 15 (36 Atl. Rep. 1072). Where a statute (N. C. Private Acts 1883, ch. 12, § 2) provides that the corporate limits of a town shall be "¼ of a mile east, west, north and south from the center of the town, which center is the site of a brick building formerly known as the court house; and shall run with the four cardinal points of the compass," it is held that the boundary is a square whose sides run east and west and north and south, the center of each line being one-fourth mile from the fixed center of the town. *State* v. *Raney*, 121 N. C. 612 (28 S. E. Rep. 366). The unvarying rule to be followed in establishing a lost corner is to start at the nearest known point on one side of the lost corner, on the line on which it was originally established; to then measure to the nearest known corner on the other side, on the same line; then, if the length of the line is in excess of that called for by the original survey, to divide it between the tracts connecting such two known points, in proportion to the length of the boundaries of such tracts on such line, as given in such survey. *Lewis* v. *Prien*, 98 Wis. 87 (73 N. W. Rep. 654). See opinion for determination of particular questions of evidence.

Sec. 100. Streams and waters as boundaries. A conveyance of land to a water course and thence with the same, passes title to the thread of the stream, unless otherwise provided or indicated. *Runion* v. *Alley*, Ky. (39 S. W. Rep. 849). Where a grantor holds the legal title to the bed of a non-navigable stream, his grant of lands extending to such stream passes title to the thread of the stream. *Hanlon* v. *Hobson*, 24 Colo. 284 (51 Pac. Rep. 433). See opinion for

collection of numerous authorities. Where a stream changes its course by reason of a freshet so as to cut off a point of the property of the landowner and leave it beyond the thread of the stream, the ownership will not be changed. *Sweatman* v. *Holbrook*, Ky. (38 S. W. Rep. 691). Low water mark on the shore of a lake, as a boundary, is the line or level at which the waters of a lake should stand when free from disturbing causes; where one of the boundaries in a deed is in fact, substantially coincident with the shore of the lake at low water mark, then the fact that no mention is made of the lake as a boundary, will not overcome the presumption of the intent to convey to its low water mark, unless a contrary intention is manifest from the language of the deed. *Slauson* v. *Goodrich Transp. Co.*, 94 Wis. 642 (69 N. W. Rep. 990). Cal. Stat. 1852, p. 180; Stat. 1861, pp. 884, 886; Stat. 1862, p. 337; Stat. 1868, p. 222, construed and applied—exhaustive consideration of the boundary of the town of Oakland, Cal., and construction of grant of riparian lands. *City of Oakland* v. *Oakland Water-Front Co.*, 118 Cal. 160 (50 Pac. Rep. 277).

Sec. 102. Streams as—Grants by United States—Title to islands. Grants by the United States for its public lands bounded on streams and other water courses, made without reservation or restriction, are to be construed as to their effect, according to the law of the state in which the land lies. *Ne-Pee-Nauk Club* v. *Wilson*, 96 Wis. 290 (71 N. W. Rep. 661); *White* v. *Leovy*, 49 La. 1660 (22 So. Rep. 931). Citing, *Hardin* v. *Jordan*, 140 U. S. 371 (11 Sup. Ct. Rep. 801, 838). Each state determines for itself to what extent it will exercise its prerogative over such streams and bodies of water. In Wisconsin it is held that grants by the United States, of lands bounded by a meandered lake or other permanent body of water, convey title only to the natural shore of the body of water, while the title to the land which is under the water is in the state. *Ne-Pee-Nauk Club* v. *Wilson*, 96 Wis. 290 (71 N. W. Rep. 661). Grants by the government are to be construed according to the common law unless some act has been done by the government to qualify or exclude that construction, and all grants by the government having their boundaries upon streams not navigable by the common

law, entitle the grantee to all islands lying between the main land and the center of the thread of the current. *President of Kaskaskia* v. *McClure*, 167 Ill. 28 (47 N. E. Rep. 72). A patent from the government of land bounded on one side by a meandered stream containing an island, which is not indicated on the plats of the survey or included in the computation of the quantity of land patented, does not pass title to the island to the patentee where subsequently the government has caused the island to be surveyed and patented it to another. The patent of the first patentee extends only to the middle thread of the channel of the river running next to his land. *Steinbuchel* v. *Lane*, 59 Kan. 7 (51 Pac. Rep. 886).

Sec. 103. **Monuments, courses and distances—Surveyor's stakes.** Monuments control courses and distances. *Simpkins' Adm'r* v. *Wells*, Ky. (42 S. W. Rep. 848). Course and distance control where a monument cannot be identified; and where the evidence as to the identity is conflicting, the question is for the jury. *Deaver* v. *Jones*, 119 N. C. 598 (26 S. E. Rep. 156). Where a deed describes property conveyed by reference to fixed monuments and refers to it as being the same property conveyed by another deed, the description by monuments prevails if there is a conflict. *Stark* v. *Spalding*, Ky. (39 S. W. Rep. 284). Where a deed calls to adjoin certain or adjacent surrounding tracts it is the same as to say, to go to and run with the lines of such tracts. *O'Dell* v. *Swaggerty*, Tenn. (42 S. W. Rep. 175). Where a deed gives a boundary by land of another the true line of the ownership of the adjoining land is the monument; and it matters not whether the deed of the land referred to is recorded or not. *Smith* v. *Sweat*, 90 Me. 528 (38 Atl. Rep. 554). Where land is sold bordering on a highway the thread or center line of the highway is presumed to be the boundary of such land. *Carpenter* v. *Buckman*, Ky. (41 S. W. Rep. 579). Where monuments established by a government survey cannot be found and there is a controversy as to the location of the corner or corners, then courses, distances and area, as given by the field notes of the United States survey, will control in ascertaining lost corners. *Carter* v. *Hornback*, 139 Mo. 238 (40 S. W. Rep. 893). In deter-

mining the boundary of a street, in the absence of any original monuments which can be ascertained, the location and occupancy of lots in immediate blocks and the lines and corners of streets and blocks thereby established, as indicated by old fences, old buildings, and the streets as so laid out and used for many years, and stakes and monuments established by former surveyors, are competent evidence to prove the actual location. *City of Madison* v. *Mayers*, 97 Wis. 399 (73 N. W. Rep. 43; 65 Am. St. Rep. 127; 40 L. R. A. 635). Where a boundary line which is to connect with a third line is described as running to a certain angle from a street the angle will control over a mere estimate of the length of the proposed line. *Iverson* v. *Swan*, 169 Mass. 582 (48 N. E. Rep. 282).

Where an owner of land upon a proposed adjacent street who has a boundary line of the street located by a surveyor who sets stakes showing such location, points out, sells and conveys lots in reference to such stakes the purchasers take their title in accordance with such boundary line, and are not affected by a plat of the lots subsequently made by such owner fixing a different boundary within the original line. Gross' Ill. Stat. 1871, p. 102, applied. *City of Joliet* v. *Werner*, 166 Ill. 34 (46 N. E. Rep. 780). In determining the boundaries of a city lot the lines run on the ground and the stakes set by the surveyor control over lines marked on a plat. *City of Decatur* v. *Niedermeyer*, 168 Ill. 68 (48 N. E. Rep. 72). The court say: "As has been repeatedly held by this court, the true boundary lines of a city lot are where they are actually marked by the monuments placed by the surveyor to indicate where they are to be found, and the most satisfactory evidence of the place where the lines were located is afforded by the original stakes. The monuments must necessarily control the field notes and maps of the survey, as well as courses, distances, and quantity. These monuments are facts. The field notes and plats are but descriptions which serve to assist in ascertaining facts."

CHARITABLE USES.

EPITOME OF CASES.

Sec. 104. Conveyances for—Who may take—Definiteness required. A charitable devise may be to an unincorporated association; and in such case the individuals composing it who may be identified by the evidence, take as natural persons. *Dye* v. *Beaver Creek Church*, 48 S. C. 444 (26 S. E. Rep. 717; 59 Am. St. Rep. 724). Citing, *Bates* v. *Taylor*, 28 S. C. 476 (6 S. E. Rep. 327). Where a statute (Wis. Rev. Stat., §§ 931, 1499) gives a city power to establish a public library and reading room and charges it with the relief and support of its resident poor, it has power to accept land devised to it for establishing and maintaining a public library and for establishing a home for the aged and poor. In such a case the devise for library purposes is not invalidated by the fact that it is coupled with a devise to maintain a business men's club room, which the city has no power to do, where the latter devise is a mere accessory to the principal devise for library purposes. *Beurhaus* v. *City of Watertown*, 94 Wis. 617 (69 N. W. Rep. 986). An unincorporated society, or a voluntary association, like a religious society or denomination is capable of taking as a beneficiary in a trust. *White* v. *Rice*, 112 Mich. 403 (70 N. W. Rep. 1024). Under Minn. Gen. Stat., § 4274, it is held that a devise to certain trustees for the benefit of a certain branch of the Salvation Army, as such, is invalid on account of the indefiniteness of the beneficiary; but applying §§ 3022, 3027, 3048, authorizing religious societies to incorporate and hold property, such branch of the Salvation Army may incorporate, and if it does so within a reasonable time, the devise will vest in such corporation and be upheld. Buck, J., dissenting. *Dickinson* v. *Fitterling*, 69 Minn. 162 (71 N. W. Rep. 1030). A bequest to certain named trustees "for the benefit of the New Jerusalem Church (Swedenborgian) as they shall deem best," was held void for uncertainty. *Fifield*

v. *Van Wyck's Ex'r*, 94 Va. 557 (27 S. E. Rep. 446; 64 Am. St. Rep. 745). A devise to a church "for poor children for their tuition," is held not void as being uncertain as to the objects and beneficiaries of the use. *Dye* v. *Beaver Creek Church*, 48 S. C. 444 (26 S. E. Rep. 717; 59 Am. St. Rep. 724). A charitable bequest designates the beneficiaries with sufficient definiteness where it is made to trustees "for the benefit of the worthy poor people of the town of P. as may be in needy and necessitous circumstances and in any misfortune; always excluding from assistance or aid the criminal class or the habitually intemperate, indolent and lazy; but to all the worthy poor people of said town." *In re Strong's Appeal* 68 Conn. 527 (37 Atl. Rep. 395). Particular charitable bequest held void on account of the uncertainty of the beneficiaries. *Pack* v. *Shanklin*, 43 W. Va. 304 (27 S. E. Rep. 389).

Sec. 105. Conveyances for—Validity—Perpetuities. A bequest for the maintenance of free public schools is a valid charity, although a system of public schools is maintained by the state. *In re John's Will*, 30 Or. 494 (47 Pac. Rep. 341; 36 L. R. A. 242). Citing, *Green* v. *Blackwell*, N. J. Eq. (35 Atl. Rep. 875). A bequest for the erection of a monument in honor of Pennsylvania soldiers is a valid charity. *In re Smith's Estate*, 181 Pa. St. 109 (37 Atl. Rep. 114). A bequest to trustees for the purpose of purchasing a lot and building a chapel in Carndrine, Ireland, "to be forever used for purposes of public worship under the auspices of the Roman Catholic church," is a gift for a charitable use; and the fact that the charity would be administered in a foreign country does not, of itself, render the gift void, where there is nothing to show that it would not be a good public charity by the law of Ireland. *Teele* v. *Bishop of Derry*, 168 Mass. 341 (47 N. E. Rep. 422; 60 Am. St. Rep. 401; 38 L. R. A. 629). The bequest of a certain sum to a Catholic bishop, to be used and applied for masses for the repose of souls of certain persons specified is invalid, for the reason that there is no beneficiary who may enforce performance of the trust. *McHugh* v. *McCole*, 97 Wis. 166 (72 N. W. Rep. 631; 65 Am. St. Rep. 106; 40 L. R. A. 724). A devise of land, the in-

come of which is to be applied to the extent necessary to the keeping of the testator's family lot in a grave yard in order, the balance to be applied to other recognized charities, is valid. *Nauman* v. *Weidman*, 182 Pa. St. 268 (37 Atl. Rep. 868). The validity of a charitable bequest for the benefit of the poor of a certain town cannot be assailed because it relieves the burden of taxation. *In re Strong's Appeal*, 68 Conn. 527 (37 Atl. Rep. 395). A devise for a charitable purpose to a charitable corporation is not invalidated by the fact that the corporation will thereby acquire property in excess of the amount which the statute authorizes it to hold, and objection to the validity of such a devise can only be raised by the state. *Farrington* v. *Putnam*, 90 Me. 405 (37 Atl. Rep. 652; 38 L. R. A. 339). Minn. Gen. Stat. 1894, § 3040, abrogates the rule against perpetuities so far as it applies to conveyances or devises of property for "meeting house, burying ground, or for residence of the preacher." *Lane* v. *Eaton*, 69 Minn. 141 (71 N. W. Rep. 1031; 38 L. R. A. 669; 65 Am. St. Rep. 559). Pa. Pub. Laws, 1891, p. 19, provides that no disposition of property made for the maintenance of any cemetery, church yard, etc., or monument or other erections on or about the same, shall fail by reason of such disposition having been made in perpetuity, but shall be held to be made for a charitable purpose. *In re Smith's Estate*, 181 Pa. St. 109 (37 Atl. Rep. 114). A devise of lands to a city for purposes charitable in their nature which perpetually suspends the power of alienation, is void under Wis. Rev. Stat., §§ 2038, 2039, the city not being a literary or charitable corporation within the exception provided for by § 2039. *Beurhaus* v. *City of Watertown*, 94 Wis. 617 (69 N. W. Rep. 986).

Sec 106. Administration of charitable uses—Duties and powers of trustees—Power of courts. Failure to provide for conveyance by executors to a board of trustees provided for in a will creating a charity, even if it is an oversight, will not prevent the execution of the trust, as the property, even if it descends to the heirs of the executor or testator, will be held charged with the trust, and equity will place it in the proper channel of administration. *In re John's Will*, 30 Or. 494 (47 Pac. Rep. 841; 36 L. R. A. 242). If a trustee is

appointed by the testator, and the will shows that the object of the devise, though expressed in general terms, is for a charitable use, the trust will be declared valid. In such a case the duty devolves upon the trustee of devising a scheme for carrying the trust into effect. If a trustee is not appointed by the testator, and the will does not declare the manner in which the devise is to be made effectual, equity will not administer the trust. *Dye* v. *Beaver Creek Church*, 48 S. C. 444 (26 S. E. Rep. 717; 59 Am. St. Rep. 724). Where a bequest to build a chapel at a particular place, title to which shall be vested in the bishop of the Roman Catholic church, fails of execution because the bishop refuses to co-operate in the scheme and the people of the locality are too poor to support the chapel, the fund cannot be diverted by the application of the doctrine of *cy pres*, to repairing and sustaining a neighboring parish church, but the bequest will be held to have failed. *Teele* v. *Bishop of Derry*, 168 Mass. 341 (47 N. E. Rep. 422; 60 Am. St. Rep. 401; 38 L. R. A. (629). The doctrine of *cy pres* does not prevail in Wisconsin. *McHugh* v. *McCole*, 97 Wis. 166 (72 N. W. Rep. 631; 65 Am. St. Rep. 106; 40 L. R. A. 724). A trustee of a charitable trust cannot divest himself of his title without the consent of the proper court, by a conveyance executed in pursuance of a compromise made with the heirs of the creator of the trust. *Nauman* v. *Weidman*, 182 Pa. St. 263 (37 Atl. Rep. 863). Shannon's Tenn. Code, §§ 1430, 1441, giving school directors control of common school houses, does not authorize them to take control of property conveyed to trustees by individuals for certain well defined public purposes, including the use thereof as school property. *Swadley* v. *Haynes*, Tenn. (41 S. W. Rep. 1066).

Sec. 107. Reversion of property upon abandonment of the trust. Where property is conveyed for a specific charity and the trust is abandoned, it will revert to the donor, although the deed contained no express provision for a reversion. *Jenkins* v. *Jenkins University*, 17 Wash. 160 (49 Pac. Rep. 247). The court say: "A great many cases have been cited by the appellant on the subject of somewhat similar gifts, and the right to a reversion, but many of them are not appli-

cable. In most cases the property had been conveyed to a municipal corporation, and had been diverted to a different use from that contemplated in the deed. But here was an entire abandonment of the purposes of the trust, and apparently of the property by the appellant, and the respondent's inquiry is a pertinent one,—that, if the land does not revert, what is to become of it? It can not be taken to satisfy the debts contracted, with the exception of that part which was authorized to be mortgaged; and it could not be devoted to another like charitable purpose, the specific one having failed, as is sometimes done in the case of a devise. If the plaintiff is not entitled to a reversion of the property under such circumstances, who is to have it? The authorities generally agree that it is not essential that such a deed shall contain a clause providing for a reversion, and, while it is to be construed againt the grantor, it must not be construed so strongly as to make it impossible to have a reversion where none is expressly provided for in terms. It seems to us, considering all the facts and the terms of the gift, that the plaintiff is entitled to a reversion; and even if the deed had contained an express condition to that effect, it could have made the case little, if any, stronger. 2 Pom. Eq. Jur. (2 Ed.), § 1032; 1 Perry, Trusts (4th Ed.), §§ 159, 160; *Gumbert's Appeal*, 110 Pa. St. 496 (1 Atl. Rep. 437); *Mott* v. *Danville Seminary*, 129 Ill. 403 (21 N. E. Rep. 927; 28 N. E. Rep. 54); *Schlessinger* v. *Mallard*, 70 Cal. 326 (11 Pac. Rep. 728)."

Sec. 108. Church controversies—Title to property. Where there has been a schism in a church the members which adhere to its constitution and doctrine have the right to the possession of the church real estate although they may be in the minority. *Lemp* v. *Raven*, 118 Mich. 375 (71 N. W. Rep. 627). Following, *Bear* v. *Heasley*, 98 Mich. 279 (57 N. W. Rep. 270). See Ballard's Law of Real Prop., Vol. V. § 64. Where a church organization holding property and funds in trust for the benefit of its members is divided into two new and independent organizations by an ecclesiastical body having authority to make such division the two new organizations become the successors of the original organization, and the money and property should be apportioned

according to the numerical strength of each; and this is true, although the original organization was incorporated under Cal. Civ. Code, § 595. *Wheelock* v. *First Presbyserian Church* 119 Cal. 477 (51 Pac. Rep. 841). Citing, *Gaff* v. *Greer*, 88 Ind. 122 (45 Am. Rep. 449); *Winebrenner* v. *Colder*, 43 Pa. St. 249; *Nicholls* v. *Rugg*, 47 Ill. 47; *Ferraria* v. *Vasconcellos*. 81 Ill. 53. The condition in a deed upon which title of lands conveyed for church purposes shall revert to the grantor cannot be invoked by one faction of the grantee to the prejudice of another. Where the rights of a faction of a church to control its property or records is mainly dependent upon matters of religious doctrine as to which the disputing factions entertain diverse views, civil courts should decline to interfere. *Moseman* v. *Heitshousen*, 50 Neb. 420 (69 N. W. Rep. 957). Under the government and usages of the Missionary Baptist denomination in Missouri the congregation of a church has the sole power to appoint its trustees, and the legal title to the property is vested in those regularly appointed and cannot be divested by the vote of a small minority acting independently, though they may alone of the membership truly represent and be governed by the "rules, usages and faith of the Missionary Baptist church of the state of Missouri." *Turpin* v. *Bagby*, 138 Mo. 7 (39 S. W. Rep. 455). For particular case determining the rights of conflicting claimants to church property see *White* v. *Rice*, 112 Mich. 403 (70 N. W. Rep. 1024). Under Ill. Rev. Stat., ch. 32, § 41, upon the incorporation of a church, title to its property vests in the corporation, and it is a necessary party to any suit affecting such property. *Dubs* v. *Egli*, 167 Ill. 514 (47 N. E. Rep. 766). Minn. Sp. Laws, 1887, ch. 378, applied—construction of powers of the Central Park Methodist church of St. Paul, Minn.—validity of devise to. *Lane* v. *Eaton*, 69 Minn. 141 (71 N. W. Rep. 1031; 38 L. R. A. 669; 65 Am. St. Rep. 559).

COMMUNITY PROPERTY.

[In Vol. III, §§ 70-87; Vol. IV, §§ 68-71; Vol. V, §§ 65-69, will be found a compilation of the statutes and decisions of the several states and territories on the subject of Community Real Estate. Below we give such amendments, changes and additional constructions as have been made.]

Sec. 109. Arizona. (See Vol. III, § 79.) Revised Statutes § 2102 has been amended so as to read as follows: "All property acquired by either husband or wife during the marriage, except that which is acquired by gift, devise or descent, or earned by the wife and her minor children, while she has lived or may live separate and apart from her husband, shall be deemed the common property of the husband and wife, and during the coverture may be disposed of by the husband only; Provided, that the wife joins in all deeds or mortgages to real estate." Laws 1899, p. 43. All property purchased during coverture whether the conveyance be taken in the name of the husband or that of the wife or in their joint names, is to be deemed *prima facie* community property and during his life the husband has entire control over community property and can sell and convey it without his wife's joinder in it. Rev. Stat. 1887, § 2102. *Tuttle* v. *Green*, Ariz. (48 Pac. Rep. 1009).

Sec. 110. California. (See Vol. III, § 80; Vol. IV, § 68; Vol. V, § 65.) The provisions of Civ. Code, § 172, as amended March 31, 1891, Acts 1891, p. 425 (see Ballards' Law of Real Property, Vol. III, § 80), which provides that the husband "cannot make a gift of such community property or convey the same without a valuable consideration unless the wife in writing consents thereto," is unconstitutional as to community property acquired before its passage. *Spreckels* v. *Spreckels*, 116 Cal. 339 (48 Pac. Rep. 228; 58 Am. St. Rep. 170; 36 L. R. A. 497). A surviving wife has no rights under Civ. Code, § 1402, in community property which are not subject to an allotment of the probate homestead, under Code Civ. Proc. § 1465. *In re Still's Estate*, 117 Cal. 509 (49 Pac. Rep. 463). Particular evidence held sufficient to rebut the presumption that a husband's interest in partnership property, upon a division thereof, was community property. *In re Boody's Estate*, 119 Cal. 402 (51 Pac. Rep. 634). Construing Civ. Code, § 679, which provides that "the ownership of property is absolute when a single person has absolute dominion over it," in connection with § 172, which before its amendent by the act of March 31, 1891, gave the husband "the management and control of the community property, with the like absolute power of possession (other

than testamentary) as he has of his separate estate," it is held that the husband is the absolute owner of the community property and that the wife has no vested interest therein till the dissolution of the marriage and is not a proper party to be joined as plaintiff in an action to recover community property. *Spreckels* v. *Spreckels*, 116 Cal. 339 (48 Pac. Rep. 228; 58 Am. St. Rep. 170; 36 L. R. A. 497).

Sec. 111. Idaho. (See Vol. III, § 81). The only estate or interest the wife has in that portion of the community property which is occupied as a residence, and not dedicated as a homestead, is subject to the control of the husband, except as to the alienation or incumbrance, as prescribed by the statutes. A residence can be changed or abandoned at any time by the husband without the consent of the wife; and, when such change or abandonment has taken place, the property is again under the absolute control of the husband, unless the same has been dedicated as a homestead as provided by law. *Law* v. *Spence*. Idaho (48 Pac. Rep. 282). Upon the death of either spouse, the survivor holds the legal title to one-half of the community property absolutely, and the other half in trust for the heirs subject to its due proportion of the community debts, and it will be presumed in favor of a purchaser claiming title for a long time under such survivor that the sale was made necessary on account of the existence of community debts. *Von Rosenberg* v. *Perrault*, Idaho (51 Pac. Rep. 774).

Sec. 112. Louisiana. (See Vol. III, § 82; Vol. IV, § 69; Vol. V. § 66). Particular evidence held insufficient to rebut the presumption that property acquired by a wife was community property. *Nouvet* v. *Municipal Imp. Co.*, 49 La. 37 (21 So. Rep. 170). The usufruct of a surviving spouse of the share of the deceased spouse in community property, is not affected by the fact that there is an adopted child of the spouses surviving the deceased. Rev. Civ. Code, art. 915, 916; Rev. Stat., §§ 628, 629, applied. *Succession of Teller*, 49 La. 281 (21 So. Rep. 265). As to the right of a surviving spouse in community property and its liability for debts, see *Zeigler* v. *His Creditors*, 49 La. 144 (21 So. Rep. 666). The heirs of a deceased wife are not bound to await liquidation of the community before resorting to a petitory action to recover their share of the community. *Ogden* v. *Leland University*, 49 La. 190 (21 So. Rep. 685) Particular case as to accounting between the separate estate of deceased spouse and the community estate· *Succession of Webre*, 49 La. 1491 (22 So. Rep. 390). For particular case upon partition of commuuity property, see *Hottinger* v. *Hottinger*, 49 La. 1633 (22 So. Rep. 847).

Sec. 113. Nevada. (See Vol. III, § 84; Vol. V, § 67). Under Nev. Gen. Stat., § 539, the wife has a right to select a homestead out of the community property and file the required declaration without the knowledge or consent of her husband. Such a declaration has priority over a previous mortgage of the property given by the husband, which on account of error in the description does not cover the homestead and

such homestead is exempt from the payment of any mortgage thereon subsequently given, unless the same is executed and given by both husband and wife. *Adams* v. *Baker*, Nev. (51 Pac. Rep. 252).

Sec. 114. New Mexico. (See Vol. III, § 85). For a discussion of the history and construction of the laws of New Mexico in reference to community property, see *Barnett* v. *Barnett*, N. M. (50 Pac. Rep. 337); *Crary* v. *Field*, N. M. (50 Pac. Rep. 342).

Sec. 115. Texas. (See Vol. III, § 86; Vol. IV, § 70; Vol. V, § 68). Property acquired during the existence of the marital relation will be presumed to be community property. *Byrn* v. *Kleas*, 15 Tex. Civ. App. 205 (39 S. W. Rep. 980). Property purchased with money originally belonging to a wife which her husband had reduced to his possession while they were living in another state, the laws of which gave him title thereto, in such a case does not constitute community property. *McDaniel* v. *Harley*, Tex. Civ. App. (42 S. W. Rep. 323). Land located under land certificates, in which a wife had no interest, by her husband, after her death, will not be treated as community property. *Figures* v. *Gregg*, Tex. Civ. App. (39 S. W. Rep. 1011). A wife does not acquire any community interest in land conveyed to her husband solely in the capacity of a trustee. *Crenshaw* v. *Harris*, 16 Tex. Civ. App. 263 (41 S. W. Rep. 391). Where a husband holds the legal title to community lands a purchaser from him, after the wife's death, takes the land free from the equitable community title of her heirs where he has no notice of such title. *Mangum* v. *White*, 16 Tex. Civ. App. 254 (41 S. W. Rep. 80). A conveyance of a wife's interest in the community executed by her husband after her death does not affect the title of her heirs. *Parker* v. *Stephens*, Tex. Civ. App. (39 S. W. Rep. 164). The will of a deceased husband cannot empower his executor to convey his surviving wife's interest in the community. *Mealy* v. *Lipp*, 16 Tex. Civ. App. 163 (40 S. W. Rep. 824). It is not essential to the validity of a deed of trust given by the husband on community property that the wife shall join in its execution. *Boehm* v. *Beutler*, 16 Tex. Civ. App. 380 (41 S. W. Rep. 658). A power of sale in a deed of trust of community property to secure a husband's debt is not revoked by the subsequent death of the wife, and title to her interest in the community property will pass upon a regular exercise of such power. *Western Union Tel. Co.* v. *Hearne*, Tex. Civ. App. (40 S. W. Rep. 50). For construction of particular conveyance by a man and his second wife of the community estate belonging to himself and his deceased wife see *Bass* v. *Davis*, Tex. Civ. App. (38 S. W. Rep. 268). Act of Congress of the Republic, Jan. 20, 1840, construed and applied—descent and distribution of community property. *McCown* v. *Owens*, 15 Tex. Civ. App. 346 (40 S. W. Rep. 336).

Sec. 116. Washington. (See Vol. III, § 87 Vol. IV, § 71; Vol. V, § 69). Land conveyed to a wife during the continuance of the marriage relation will be presumed to be community property. *Woodland Lumber Co*

v. *Link*, 16 Wash. 72 (47 Pac. Rep. 222). A conveyance of community property by a married man to a woman with whom he is living in adultery, passes no title, the grantee having knowledge of the facts. *Kimble* v. *Kimble*, 17 Wash. 75 (49 Pac. Rep. 216). Where a surviving husband whose wife left community property and community debts, subsequently remarries and then dies, an allowance to his second wife out of his interest in the community property, cannot be given such superiority as to cast upon the first wife's share of the community property, more than half of the community debts. Hill's Code, Vol. I, § 1481; Vol. II, § 974, construed and applied. *In re Cannon's Estate*, 18 Wash. 101 (50 Pac. Rep. 1021).

CONTRACTS.

EPITOME OF CASES.

Sec. 117. Validity of contracts—Public policy. A sale of land which a purchaser may rescind, at his election, on account merely of the fraud which the law, *prima facie*, imputes to it, when effected by an agent of the purchaser, who at the same time represents the vendor, for a promised reward, is not void as against public policy, the transaction not appearing to be one of a public character; and, so long as the purchaser does not complain, there is no cause for treating the contract of sale other than as valid, and no reason why the vendor, who has enjoyed the benefit of the unrescinded sale, should not pay the selling agent his stipulated reward. *Dexter* v. *McClellan*, 116 Ala. 87 (22 So. Rep. 461). A contract with commissioners to convey to the county certain land free of charge in case it is chosen by them as a site for a court house, is not void as against public policy. *Island Co.* v. *Babcock*, 17 Wash. 438 (50 Pac. Rep. 54). Where a statute (Starr & C. Ann. Ill. Stat., Vol. 1, p. 472, art. 5, par. 63, subd. 90) requires as a condition precedent to the grant by a municipality of authority to construct a street railroad in its streets, that the owners of more than one-half of the property abutting on the street where the road is sought to be located, consent to its location, a contract purchasing the consent of a property owner is void as against public policy. The same is held as to an agreement by a street railway company with an

abutting owner not to lay a second track without his consent. *Doane* v. *Chicago City Ry. Co.*, 160 Ill. 22 (45 N. E. Rep. 507; L. R. A. 588). An agreement having for its object the suppression of competitive bidding at a judicial sale, is void, and no recovery can be had thereon. *De Baun* v. *Brand*, 60 N. J. L. 288 (37 Atl. Rep. 726). Fictitious bids made by an auctioneer at the instance of an owner, although such fraudulent conduct may be customary, renders an auction sale of land void. *Flannery* v. *Jones*, 180 Pa. St. 338 (36 Atl. Rep. 856; 57 Am. St. Rep. 648). No action can be maintained upon a lease of Indian lands made in violation of U. S. Rev. Stat., § 2116. *Mayes* v. *Cherokee Strip Live-stock Ass'n*, 58 Kan. 713 (51 Pac. Rep. 215).

Sec. 118. Validity of contracts—Gambling and usurious contracts. Where, to promote the establishment of a manufacturing plant, several parties join in a subscription agreeing to purchase lots, the method of the division of the lots to be decided upon by a vote of subscribers, such contract is not rendered invalid as constituting a lottery, within the meaning of Ia. Code 1873, § 4043, or Const., art. 3, § 28, prohibiting lotteries, on account of the fact that the subscribers subsequently apportioned the lots by casting lots. *Chancy Park Land Co.* v. *Hart*, 104 Ia. 592 (73 N. W. Rep. 1059). The effect of violating the law against usury cannot be avoided by disguising the transaction, in fact a loan, by putting it in the form of a sale. *Watts* v. *National Bldg. Loan Ass'n*, Ky. (42 S. W. Rep. 889). Where the place of performance of a contract is fixed in a foreign state for the avowed purpose of evading the usury laws of the state in which it must be enforced, the laws of the latter state upon usury will govern in its enforcement. *Building & Loan Ass'n* v. *Griffin*, 90 Tex. 480 (39 S. W. Rep. 656).

Sec. 119. Validity of contracts made in violation of a license law. Construing and applying the statutes of Idaho (Rev. Stat. §§ 1636, 1644, 6983), making it a misdemeanor for one to engage in the business of loaning money at interest without obtaining license and paying a license tax, it is held that a note and mortgage to secure the repayment of

money loaned at interest, taken by one engaged in such business without obtaining the required license may be enforced. *Vermont Loan & T. Co.* v. *Hoffman*, Idaho (49 Pac. Rep. 814; 37 L. R. A. 509). The court say: "The general rule, as urged by appellants, that a contract founded on an act forbidden by a statute under a penalty is void, although it be not expressly declared to be so, is correct, and well established by authority. But in applying the rule many courts have excepted from its operation one class of cases, viz. when the statutory prohibition is found in a statute enacted for the purpose of raising revenue or the regulation of traffic or business, when, unless it is manifestly the intention of the statute to make the contract void, the court will treat the contract as valid. Mr. Sutherland, in his admirable work on Statutory Construction, at § 366, in treating the question under consideration, very aptly says: 'When a statute is for revenue purposes, or is a regulation of a traffic or business, and not to prohibit it altogether, whether a contract which violates the statute shall be treated as wholly void will depend on the intention expressed in the particular statute. Unless the contrary intention is manifest, the contract will be valid.' And in support of the rule Mr. Sutherland, in a foot note, cites many authorities, among the following which support the text, as we have seen by a careful examination of the cases, to-wit: *Harris* v. *Runnels*, 12 How. 79; *Insurance Co.* v. *Bledsoe*, 52 Ala. 538; *Niemeyer* v. *Wright*, 75 Va. 239 (40 Am. Rep. 720); *Johnson* v. *Hudson*, 11 East 180; *Brown* v. *Duncan*, 10 Barn. & C. 93; *Parton* v. *Hervey*, 1 Gray 119; *Bly* v. *Bank*, 79 Pa. St. 453; *Pangborn* v. *Westlake*, 36 Ia. 546; *Bemis* v. *Baker*, 1 Kan. 226; *Lindsey* v. *Rutherford*, 17 B. Mon. 245; *Strong* v. *Darling*, 9 Ohio 201; *Watrous* v. *Blair*, 32 Ia. 58; *Foster* v. *Railway Co.* 13 C. B. 200; *O'Hare* v. *Bank*, 77 Pa. St. 96; *Vining* v. *Bricker*, 14 O. St. 331. The following are other authorities supporting the rule laid down by Mr. Sutherland, cited above, which we have examined, to-wit: *Fackler* v. *Ford*, 24 How. 322; *Mandlebaum* v. *Gregovich*, 17 Nev. 87 (28 Pac. Rep. 121); *La France Fire Engine Co.* v. *Town of Mt. Vernon*, 9 Wash. 142 (37 Pac. Rep. 287; 43 Am. St. Rep. 827); *Larned* v. *Andrews*, 106 Mass. 435 (8 Am. Rep. 346); *Bowditch* v. *In-*

surance Co., 141 Mass. 292 (4 N. E. Rep. 798); *Dearborn Foundry Co.* v. *Augustine*, 5 Wash. 67 (31 Pac. Rep. 327); *Edison General Electric Co.* v. *Canadian Pac. Nav. Co.*, 8 Wash. 370 (36 Pac. Rep. 260; 24 L. R. A. 315); *Trust Co.* v. *Dorsey*, 72 Cal. 55 (12 Pac. Rep. 49; 13 Pac. Rep. 148); *Bank* v. *Matthews*, 98 U. S. 621; *Mill Co.* v. *Bartlett*, 8 N. Dak. 138 (54 N. W. Rep. 544); *Wright* v. *Lee*, 2 S. Dak. 596 (51 N. W. Rep. 706); *Lumber Co.* v. *Thomas*, 33 W. Va. 566 (11 S. E. Rep. 37; 25 Am. St. Rep. 925); *Dillon* v. *Allen*, 46 Ia. 299 (26 Am. Rep. 145); *Pennypacker* v. *Insurance Co.*, 80 Ia. 56 (45 N. W. Rep. 408; 20 Am. St. Rep. 395; 8 L. R. A. 286); *Ruckman* v. *Bergholz*, 37 N. J. L. 437; *Corning* v. *Abbott*, 54 N. H. 469; *Aiken* v. *Blaisdell*, 41 Vt. 655; *State Mut. Fire Ins. Ass'n* v. *Brinkley Stave & Heading Co.*, 61 Ark. 1 (31 S. W. Rep. 157; 51 Am. St. Rep. 191; 29 L. R. A. 712); *Rahter* v. *Bank*, 92 Pa. St. 393; *Insurance Co.* v. *McMillen*, 24 O. St. 67; *De Mers* v. *Daniels*, 39 Minn. 158 (39 N. W. Rep. 98); *Machine Co.* v. *Caldwell*, 54 Ind. 270; *U. S.* v. *Martin*, 94 U. S. 400."

Sec. 120. **Construction of contracts.** Where the terms of a written agreement are in any respect doubtful or uncertain, or if the contract contains no provisions on a given point, or if it fails to define with certainty the duties of the parties with respect to a particular matter or in a given emergency, and the parties to it have, by their own conduct, placed a construction upon it which is reasonable, such construction will be adopted by the court, upon the principle that it is the duty of the court to give effect to the intention of the parties where it is not wholly at variance with the correct legal interpretation of the terms of the contract. *Shouse* v. *Doane*, 39 Fla. 95 (21 So. Rep. 807). An agreement by a vendee to pay "$100 as rent for five years," in case he failed to pay the purchase money notes at maturity, is not an agreement to pay $100 annually, but to pay that sum as rent for five years. *Sample-Carter Co.* v. *Cox*, Miss. (22 So. Rep. 801). The validity of a contract containing personal covenants concerning real estate is determined by the law of the place where the parties are domiciled at the time of its execution. *Polson* v. *Stewart*, 167 Mass. 211 (45

N. E. Rep. 787; 36 L. R. A. 771). Particular contract for the sale, management and division of profits held to create a vested interest in a party thereto. *Matthews* v. *Kerfoot*, 167 Ill. 313 (47 N. E. Rep. 359). For construction of particular contract, see *Haynie* v. *American Trust Inv. Co.*, Tenn. (39 S. W. Rep. 860).

Sec. 121. Time as the essence of a contract. An agreement that time shall be the essence need not be in any particular form. Such an agreement will be enforced in a court of equity as well as a court of law; and, if the party fails to perform at the time stipulated, the other party may treat the contract as at an end for all purposes, and therefore no court will declare specific performance thereof. But, even after such a default, the one who was not guilty of it may waive his right to treat the contract as at an end. *Fargusson* v. *Talcott*, 7 N. Dak. 183 (73 N. W. Rep. 207). Where, in an option to purchase a mining claim, time is of the essence of the contract, it is obligatory upon the would-be purchaser to perform the stipulations about to be performed within the time specified in the contract; and if he fails to do so his option to purchase may be forfeited. *Idaho Gold-Min. Co.* v. *Union Min. & Milling Co.*, Ida. (47 Pac. Rep. 95). Particular contract in which time is held not to be the essence of the contract. *Lynch* v. *Bechtel*, 19 Mont. 548 (48 Pac. Rep. 1112.)

Sec. 122. Breach of contracts—Actions for—Measure of damages. Damages, not specific performance, is the usual relief for violation of contracts when the loss to the injured party is susceptible of compensation in money. *Caperton* v. *Forrey*, 49 La. 872 (21 So. Rep. 600). Where parents, desiring to have their daughter live near them, agree with her husband that if he would move on certain land and improve it, he should have it when they were done with it, he may maintain an action for damages for their breach of the contract by conveying the land to another. *Allbright* v. *Hannah*, 103 Ia. 98 (72 N. W. Rep. 421). The measure of damages for the lessor's breach of an option given to his lessee to purchase the premises, is the difference between the price which

was to be paid for the premises and their value. *Marske* v. *Willard*, 169 Ill. 276 (48 N. E. Rep. 290). Where a vendor cannot make title, the vendee may, at his election, recover payments of purchase money made, with interest, or damages for loss of his bargain. *Seaver* v. *Hall*, 50 Neb. 878 (70 N. W. Rep. 378). Where one has received a conveyance of land as the consideration of an executory contract which cannot be enforced by reason of the statute of frauds, and he then refuses to perform the contract, he is liable to the other party to the extent of the value of the property so conveyed. *Miller* v. *Roberts*, 169 Mass. 184 (47 N. E. Rep. 585). Profits upon the sale of town lots at prices beyond their present market value, and which depended for their realization upon the working up of a "boom" and upon the contingencies and uncertainties of the future, are speculative and conjectural in character, and cannot be allowed as damages for the breach of a contract. *Carbondale Inv. Co.* v. *Burdick*, 58 Kan. 517 (50 Pac. Rep. 442). Where the price agreed to be paid for land was $3,050.00, but by a separate contract the vendee gave his note for an additional sum of $4,000.00, it being provided that such note should be cancelled if he should erect buildings upon the premises of a specified value, it is held that upon his failure to erect such buildings, the $4,000.00 will be considered as liquidated damages and not as a penalty. *Everett Land Co.* v. *Maney*, 16 Wash. 552 (48 Pac. Rep. 248). Cal. Civ. Code, § 3306, construed and applied—measure of damages for breach of contract to convey land and water rights. *Clark* v. *Yocum*, 116 Cal. 515 (48 Pac. Rep. 498).

Sec. 123. Fraud—Representations as to quality or value. A sale of land will not be set aside on account of misrepresentations as to the character of its soil and water supply where the vendee inspected the premises in detail, and had his son, a practical farmer, preparing the soil for seeding for some time before the contract was closed. *Brackett* v. *Carrico*, Ky. (38 S. W. Rep. 694). A vendee cannot obtain relief on account of the fraudulent representations of his vendor as to the existence of minerals on the land, where he had equal opportunity with the vendor of knowing the land. *Phillips* v. *Charles*, Ky. (41 S. W. Rep. 297). Representa-

tions as to the rental value constitute statements of fact and not mere expressions of opinion. *Ruberg* v. *Brown*, 50 S. C. 397 (27 S. E. Rep. 873). A contract of sale, procured by the fraudulent representations of the vendor's tenant as to the rental value of the property, may be rescinded where such representations were made by the direction of the vendor. *Briggs* v. *Dunne*, 168 Ill. 226 (48 N. E. Rep. 48). An action for fraud in procuring a contract for the sale of land, based upon fraudulent representations of the vendor's agent, will not lie unless it appears that the vendor had knowledge of such representations. *Keefe* v. *Sholl*, 181 Pa. St. 90 (37 Atl. Rep. 116). An expression of opinion, estimate, or judgment of the value of property, even if false, does not ordinarily constitute actionable fraud. But a willful misrepresentation by a vendor affirming that the rental from the property exchanged was greater than it was, when relied upon the vendee, is an actionable fraud. So a willful representation by an owner, in the exchange of real estate, that the property exchanged was high and dry, and located in a particular place, which representation was relied upon by the purchaser as true, without inspection of the premises, but which was false, and which operated to the purchaser's injury, is an actionable fraud. *Hecht* v. *Metzler*, 14 Utah 408 (48 Pac. Rep. 37; 60 Am. St. Rep. 906). A contract for the sale of a hotel procured by the vendor's fraudulent representations as to its earnings, upon which he knew the vendee relied, may be rescinded. *Miller* v. *Voorheis*, 115 Mich. 356 (73 N. W. Rep. 383). A purchaser of real estate has a right to rely upon the representations of his vendor touching the quality and location of the property and the character of the improvements thereon, whenever the facts concerning which such representations are made are not within the knowledge of the vendee. *Mullen* v. *Kinsey*, 50 Neb. 466 (70 N. W. Rep. 18). A fraudulent representation as to the amount due on a mortgage on exchanged land is not shown where the false information conveyed was not the result of any fraud or deceit of the part of the party giving it, but arose on account of his inability to accurately calculate the amount due. *Whalen* v. *Tipton*, 31 Or. 566 (50 Pac. Rep. 1016).

A written contract under which property is conveyed in

consideration of the assignment of certain contracts will not be set aside on account of fraudulent representations as to the value and character of such contracts made by the assignor, unless the proof of such fraud is clear and cogent, where the party taking the assignment was a man of business experience and had an opportunity to investigate the contracts and by his contract released the assignor from any liability as to them except as stipulated in the contract. *Hand* v. *Waddell*, 167 Ill. 402 (47 N. E. Rep. 772). Particular evidence held in sufficient to set aside an exchange of land for mining stock on account of fraudulent representations as to the value of the stock. *Crocker* v. *Manley*, 164 Ill. 282 (45 N. E. Rep. 577; 56 Am. St. Rep. 196). Particular evidence held sufficient to authorize the cancellation of a conveyance of land made for worthless mortgage notes secured by a fictitious mortgage on other land, on account of the vendee's fraudulent representations as to their value. *Rice* v. *Silverston*, 170 Ill. 342 (48 N. E. Rep. 969). Particular evidence in an action by a lessee for the fraudulent representations of a lessor's agent, held to authorize a submission to the jury of the question as to whether the lessee acted with due care in relying on the representations. *Ladner* v. *Balsley*, 103 Ia. 674 (72 N. W. Rep. 787).

Sec. 124. Fraud—Representations as to title or cost of land. Where a vendee was induced to waive his right to an abstract of title by the false and fraudulent representations of his vendor that the land was swanp land and that a deed produced by him from the county constituted a complete chain of title, he is entitled to a rescission upon showing that the land was not swamp land and had been patented to another. *Herman* v. *Hall*, 140 Mo. 270 (41 S. W. Rep. 733). Particular facts held to entitle one to recover for fraudulent representations as to title. *Baker* v. *Hallam*, 103 Ia. 43 (72 N. W. Rep. 419).

False representations of a vendor as to what the land cost will not authorize a rescission. *Sowers* v. *Parker*, 59 Kan. 12 (51 Pac. Rep. 888). Citing, *Holbrook* v. *Connor*, 60 Me. 578 (11 Am. Rep. 212); *Hemmer* v. *Cooper*, 8 Allen 334; *Cooper* v. *Lovering*, 106 Mass. 77; *Tucker* v. *Downing*, 76 Ill. 71; *Graffenstein* v. *Epstein*, 23 Kan. 443 (33 Am. Rep. 171);

Burns v. *Mahannah*, 39 Kan. 87 (17 Pac. Rep. 319); *Elerick* v. *Reid*, 54 Kan. 579 (38 Pac. Rep. 814). But in Michigan it is held that an action for deceit in the sale of real estate may be maintained where the sale was procured by fraudulent representations as to the price he paid for the land made by the vendor, upon whose veracity the vendee, who was ignorant of real estate values in the locality, relied after due inquiry as to his reputation, such representations being made by such vendor showing a false receipt of the purchase price paid by him, issued to him by his vendor; and the latter who assists in the perpetration of the fraud by issuing such receipt will be held responsible for the consequences, where the party defrauded relied upon such receipt. *Stoney Creek Woolen Co.* v. *Smalley*, 111 Mich. 321 (69 N. W. Rep. 722). The court say: "It is also urged that an action for deceit in the sale of real estate does not lie for the fraudulent misrepresentation as to the price paid. In support of this the learned counsel cite *Holbrook* v. *Connor*, 60 Me. 578 (11 Am. Rep. 212); *Medbury* v. *Watson*, 6 Metc. (Mass.) 259 (39 Am. Dec. 726); *Mooney* v. *Miller*, 102 Mass. 220. In *Medbury* v. *Watson* the question now presented was not in issue, and the language of the court upon which the counsel rely was not necessary to a decision of the case. In *Mooney* v. *Miller* the representations relied upon referred to the quantity of wood and hay that could be cut from the land, the possibility of acquiring adjoining lands with buildings thereon belonging to third persons, and to the number of acres in the lot, the boundaries of which were truly pointed out. It was properly held that the action would not lie. The case of *Holbrook* v. *Connor* appears to sustain the defendants' contention. The court was divided in opinion. The authorities are quite fully referred to and discussed in the majority and minority opinions. We cannot accede to the doctrine of that case as applied to this."

Sec. 125. Fraud—Broken promises—Statements of opinion or intention. A promise to do something in the future, though made by one party as a representation to induce another to enter into a contract, will not amount to a

fraud in a legal sense though the promise subsequently and without excuse be broken and unfulfilled. *Harrington* v. *Rutherford*, 38 Fla. 321 (21 So. Rep. 283). Citing, *Perkins* v. *Lougee*, 6 Neb. 220; *Love* v. *Teter*, 24 W. Va. 741; *Fouty* v. *Fouty*, 43 Ind. 433; *Burt* v. *Bowles*, 69 Ind. 1; *Farrar* v. *Bridges*, 8 Humph. 565; *Long* v. *Woodman*, 58 Me. 49; *Grove* v. *Hodges*, 55 Pa. St. 504; *Railway Co.* v. *Titterington*, 84 Tex. 218 (19 S. W. Rep. 472; 31 Am. St. Rep. 39); *Feret* v. *Hill*, 15 C. B. 207. As a general rule, the mere expression of an opinion, which is understood to be only an opinion, does not render a person expressing it liable for fraud. But where the statements are as to value or quality, and are made by a person knowing them to be untrue, with an intent to deceive and mislead the one to whom they are made, and he is thus induced to forbear making inquiries which he otherwise would, they may amount to an affirmation of fact rendering him liable therefor. In such a case, whether a representation is an expression of an opinion or an affirmation of a fact is a question for the jury. The rule that no one is liable for an expression of an opinion is applicable only when the opinion stands by itself as a distinct thing. If it is given in bad faith, with knowledge of its untruthfulness, to defraud others, the person making it is liable, especially when it is as to a fact affecting quality or value, and is peculiarly within the knowledge of the person making it. *People* v. *Peckens*, 153 N. Y. 576 (47 N. E. Rep. 883). A contract will not be rescinded on account of false and fraudulent representations as to one's intentions. *Farris* v. *Strong*, 24 Colo. 107 (48 Pac. Rep. 963). False representations as to proposed improvements will not afford ground for the rescission of a contract. *Lambert* v. *Crystal Spring Land Co.*, Va. (27 S. E. Rep. 462); *Slothower* v. *Oak Ridge Land Co.*, Va. (27 S. E. Rep. 466); *Ansley* v. *Bank of Piedmont*, 113 Ala. 467 (21 So. Rep. 59; 59 Am. St. Rep. 122). Statements of the opinion of a vendor as to the future growth of a town and of his intentions as to certain improvements, which subsequently prove false, do not furnish a sufficient defense to a purchase money mortgage given by a vendee, where there was no fiduciary relation between the parties and the purchaser had ample opportunity and ability to determine the

value of the property. *West Seattle L. Imp. Co.* v. *Herren*, 16 Wash. 665 (48 Pac. Rep. 341).

Sec. 126. Relief from fraud—Waiver of right to—Election of remedies. A vendor acquainted with all the facts, who accepts a part performance of the contract, cannot afterward assail it for fraud on the part of the vendee. *McWhirter* v. *Crawford*, 104 Ia. 550 (72 N. W. Rep. 505). A lessee waives his right to recover damages from his lessor on account of fraud in procuring a lease, where, after he has acquired a knowledge of all the facts tending to affect the contract with fraud he makes new agreements and engagements with the lessor respecting the property. *Schmidt* v. *Mesmer*, 116 Cal. 267 (48 Pac. Rep. 54). A vendor whose contract of sale has been procured by fraud has two remedies. He may disaffirm the contract and proceed in equity to rescind it by restoring or tendering to the vendee what he has paid, and, in case the fraud and other facts are established, he will be entitled to a decree that the defendant reconvey the land; or he may proceed in affirmance of the sale, and recover his damages at law for the deceit. He may elect either remedy but he cannot pursue both; nor can he blend the two remedies together, and affirm in part and rescind in part. *Yoemans* v. *Bell*, 151 N. Y. 230 (45 N. E. Rep. 552).

Sec. 127. Action for fraud—Measure of damages. In an action for fraud and deceit in the sale or exchange of real estate, the measure of damages is the difference between the actual value of the land as it would have been if as represented, and as it actually was. *Hecht* v. *Metzler*, 14 Utah 408 (48 Pac. Rep. 87; 60 Am. St. Rep. 906). Citing, *Stiles* v. *White*, 11 Metc. (Mass.) 356 (45 Am. Dec. 214); *Drew* v. *Beall*, 62 Ill. 164; *Matlock* v. *Reppy*, 47 Ark. 148 (14 S. W. Rep. 546); *Griffing* v. *Biller*, (Sup.) 21 N. Y. Supp. 407; *Lynch* v. *Trust Co.*, 18 Fed. 486; *Antle* v. *Sexton*, 137 Ill. 410 (27 N. E. Rep. 691); *Wright* v. *Roach*, 57 Me. 600; *Herefort* v. *Cramer*, 7 Colo. 483 (4 Pac. Rep. 896); 8 Sedg. Meas. Dam. §§ 1027–1029; *Page* v. *Wells*, 37 Mich. 415; *Vail* v. *Reynolds*, 118 N. Y. 297 (23 N. E. Rep. 301); *Stevens* v. *Allen*, 51 Kan. 144 (32 Pac. Rep. 922); *Krumm* v.

Beach, 96 N. Y. 399. Where a vendor has been induced by fraudulent representations to receive as a part of the consideration for his land depreciated shares of stock in a corporation, at par value, his measure of damages is the difference between the actual value of such stock and its par value at the date of the sale. *Yeomans* v. *Bell*, 151 N. Y. 230 (45 N. E. Rep. 552).

Sec. 128. Rescission of contracts—Particular cases. It is held sufficient proof of fraud to rescind a mortgage to show that the mortgagee has broken his promises made as an inducement to its execution. *Krouskop* v. *Krouskop*, 95 Wis. 296 (70 N. W. Rep. 475). A conveyance which passes a valid title, cannot be rescinded because the grantor fails to give the grantee possession at the time agreed in the deed. *Topping* v. *Parish*, 96 Wis. 378 (71 N. W. Rep. 867). A vendor's failure to give possession until a few days after the time stipulated, occasioned by the fault of his tenant, will not authorize a rescission, no subsequent injury having resulted therefrom. *Armstrong* v. *Breen*, 101 Ia. 9 (69 N. W. Rep. 1125). Where, on account of a mutual mistake, a contract for the sale of trees standing on a certain tract of land, misdescribes the land, the vendee is not entitled to a rescission of the entire contract, but to an allowance for the trees on that part of the land which was omitted. *Hamilton* v. *McAllister*, 49 S. C. 230 (27 S. E. Rep. 63). Where a person holding a limited optional contract for the sale of a tract of land, is prevented from making sale thereof by reason of a cloud on the title or a deficiency in the quantity not known or taken into consideration at the time of the execution thereof, such person is entitled to a rescission of such contract. *Morrison* v. *Waggy*, 43 W. Va. 405 (27 S. E. Rep. 314). Particular cases in which the right to rescind was held to exist, on account of the omission of the covenant in a deed, *Harris* v. *Calmes*, 100 Ky. 272 (38 S. W. Rep. 6); on account of grantee's failure to perform his covenant to support the grantor, *Reoch* v. *Reoch*, 98 Wis. 201 (73 N. W. Rep. 989); on account of false representations as to the size of a town in which lots sold are situated. *Grosh* v. *Ivanhoe Land & Imp. Co.*, 95 Va. 161 (27 S. E. Rep. 841). For particular cases in which the right to

rescind was denied, see *Clark* v. *Shirk*, 170 Ill. 143 (48 N. E. Rep. 182); *Garbes* v. *Roberts*, 98 Wis. 173 (73 N. W. Rep. 995); *Armstrong* v. *Breen*, 101 Ia. 9 (69 N. W. Rep. 1125).

Sec. 129. Rescission of contracts—Placing parties in statu quo. The vendee in possession with a bond for title, is not entitled to a rescission on his cross bill, in an action against him for purchase money, on account of fraudulent representations, where he does not offer to place the vendor in statu quo. *Allgood* v. *Bank of Piedmont*, 115 Ala. 418 (22 So. Rep. 35). A purchaser of land cannot rescind a contract where he occupied the premises, defaulted in the payment, and defended a foreclosure of a purchase money mortgage without making any offer to put the vendor in statu quo. *National Bank* v. *Levanselcr*, 115 Mich. 372 (73 N. W. Rep. 399). Cal. Civil Code, §§ 3406–3408, construed and applied —duty as to restoration of consideration—sufficiency of offer to restore. *Kelley* v. *Owens*, 120 Cal. 502 (47 Pac. Rep. 369).

Sec. 130. Rescission of contracts—Loss or waiver of right to rescind. The right to rescind a contract on account of fraud may be lost by an unreasonable and unexplained delay. *Cowen* v. *Harrington*, Idaho (41 Pac. Rep. 1059); *Leiker* v. *Henson*, Tenn. (41 S. W. Rep. 862). The vendee having a cause for rescission, who fails to assert his right in an action brought against him to enforce a vendor's lien, will be held to have waived his right to a rescission. *American Land & Imp. Co.* v. *Crawford*, Ky., (40 S. W. Rep. 672). Where one acquainted with the causes for a rescission, stands by the contract for several years awaiting the result of a speculation, he will be held to have lost his right to rescind. *Slothower* v. *Oak Ridge Land Co.*, Va. . (27 S. E. Rep. 466); *Ansley* v. *Bank of Piedmont*, 113 Ala. 467 (21 So. Rep. 59; 59 Am. St. Rep. 122); *Allgood* v. *Bank of Piedmont*, 115 Ala. 418 (22 So. Rep. 35); *Coleman* v. *First Nat. Bank*, 115 Ala. 307 (22 So. Rep. 84); *Hatcher* v. *Hatcher*, 139 Mo. 614 (39 S. W. Rep. 479). Delay by such a one until the rights of innocent third parties have intervened, or the position even of

the wrong-doer has been affected, will operate as a waiver of his right to rescind. *Hurt* v. *Miller*, 95 Va. 82 (27 S. E. Rep. 831). A vendee who brings his action upon discovery of the fraud relied upon, will not be barred on account of his delay, where no injury has resulted to the vendor or his creditors. *Grosh* v. *Ivanhoe Land & Imp. Co.*, 95 Va. 161 (27 S. E. Rep. 841). Where one who, when sick, conveys land to a hospital in a consideration of an agreement for his care and support, recovers from his sickness and is able to transact business for several weeks before his death, during which time he recognizes and is satisfied with the transaction, it amounts to a ratification thereof. *Barry* v. *St. Joseph's Hosp. & San. of the Sisters of Mercy*, Cal. (48 Pac. Rep. 68). One's right to have a rescission of a deed for mistake, as to the subject matter, is not defeated by the fact that the land conveyed to him is more valuable than the tract he contracted to buy, nor by the fact he has incumbered the land conveyed, where his complaint tenders a reconveyance free from incumbrances. *Clapp* v. *Greenlee*, 100 Ia. 586 (69 N. W. Rep. 1049). Where a vendee, after he has acquired knowledge of misrepresentations by his vendor which entitle him to rescind the contract of sale, remains silent, continues to receive the rent from the property, makes payments on the purchase price, and expends money in improvement of the property, he will be held to have waived his right to a rescission. *Eibel* v. *Von Fell*, 55 N. J. Eq. 670 (38 Atl. Rep. 201). Particular acquiescence in a contract and delay held to bar a claim for rescission. *Bennett* v. *Hickey*, 112 Mich. 379 (70 N. W. Rep. 900).

CORPORATIONS.

EPITOME OF CASES.

Sec. 131. Limitations upon corporate holding of land. A devise of property to a corporation in excess of the amount which its charter permits it to hold, is void. *House of Mercy* v. *Davidson*, 90 Tex. 529 (39 S. W. Rep. 924). A statute providing that banks shall not own real estate more

than sufficient for the conduct of their business unless taken in the payment of debts, does not prevent a bank from taking real estate as security for a loan. *Alexander* v. *Brummett*, Tenn. (42 S.W. Rep. 63). Limitations upon the power of a corporation to own property, imposed upon it by its charter, apply against it, as to property acquired in other states. *House of Mercy* v. *Davidson*, 90 Tex. 529 (39 S. W. Rep. 924). Citing, *Talmadge* v. *Transportation Co.*, 3 Head 340; *Thompson* v. *Waters*, 25 Mich. 214 (12 Am. Rep. 243); *Diamond Match Co.* v. *Register of Deeds*, 51 Mich. 145 (16 N. W. Rep. 314); *Bank* v. *Earle*, 13 Pet. 587. Construing and applying Cal. Stat. 1880, p. 131, providing that it shall not be lawful for the directors of any mining corporation "to purchase or obtain in any way, additional mining ground unless such act be ratified by the holders of at least two-thirds of the capital stock of such company," it is held that the statute applies only to the acquisition of additional land and does not prevent such corporaiton from acquiring mining ground in the first instance without such assent; and the power of a corporation to acquire real estate being presumed, one who claims that a conveyance to such a corporation is invalid on account of the statute, has the burden of showing that it comes within the prohibition. *Granite Gold-Min. Co.* v. *Maginnes*, 118 Cal. 131 (50 Pac. Rep. 269). The legal capacity of a corporation to take property by devise or bequest in excess of the amount prescribed by its charter, cannot be taken advantage of by the testator's heirs at law or next of kin. *Congregational Church Bldg. Soc.* v. *Everett*, 85 Md. 79 (36. Atl. Rep. 654; 60 Am. St. Rep. 308). The question as to whether or not a corporation has exceeded its powers in acquiring real estate can only be raised by the state. *Cooney* v. *A. Booth Packing Co.*, 169 Ill. 370 (48 N. E. Rep. 406); *Oregon Mort. Co.* v. *Carstens*, 16 Wash. 165 (47 Pac. Rep. 421; 35 L. R. A. 841); *Goon Gan.* v. *Richardson*, 16 Wash. 378 (47 Pac. Rep. 762). As to the power of Delaware corporations to own real estate, see Del. Laws 1899, p. 445.

Sec. 132. Foreign corporations — Construction of statutes. Construing Ala. Acts 1892-93, p. 665, requiring

foreign building and loan associations to deposit securities and pay license tax as a condition to doing business in the state, it is held that where such an association acquired the legal title to property conveyed to it by a trust deed to secure a loan by means of a sale and conveyance under a power contained therein such title is not affected by the fact that such association had not complied with the statute at the time the trust deed was given to it. *Shahan* v. *Tethero*, 114 Ala. 404 (21 So. Rep. 951). A statute (Tenn. Laws 1895, ch. 119), validating contracts of a foreign corporation, which were invalid on account of its failure to file its charter as required by Laws 1891, chs. 95, 122, is constitutional, and so is a provision in the latter act postponing the foreclosure of a mortgage taken by such corporation until two years after the passage of the act. A corporation claiming the benefit of the statute cannot assert its unconstitutionality on account of the conditions imposed by it. *Illinois Bldg. & Loan Ass'n* v. *Walker*, Tenn. (42 S. W. Rep. 191). La. Const. Art. 236, applied—validity of mortgage taken by foreign corporation. *American Freehold Land-Mort. Co.* v. *Pierce*, 49 La. 390 (21 So. Rep. 972). Hill's Ann. Wash. Code, ch. 1, 2, applied—power of foreign corporation whose capital is not all subscribed, to loan money. *Brown* v. *Elwell*, 17 Wash. 442 (49 Pac. Rep. 1068). A condition in a statute (Tenn. Laws 1895 ch. 119), validating contracts of a foreign corporation and postponing the foreclosure of mortgages given to it until two years after the passage of the act, applies to suits pending. *Illinois Bldg. & Loan Ass'n* v. *Walker*, Tenn. (42 S. W. Rep. 191). Citing *Pelt* v. *Payne*, 60 Ark. 637 (30 S. W. Rep. 426); *Sidœay* v. *Lawson*, 58 Ark. 117 (23 S. W. Rep. 648); *Sdeehan* v. *Insurance Co.*, 53 Mo. App. 351; *Odum* v. *Garner*, 86 Tex. 374 (25 S. W. Rep. 18).

Sec. 133. Contracts and conveyances by—Power to make—Manner of execution. A bank may accept a conveyance of real estate from one of its stockholders to recover a deficit in its capital stock. *Brown* v. *Bradford*, 108 Ia. 378 (72 N. W. Rep. 648). A national bank may sell grain on credit and acquire a seed grain lien under the S. Dak. Comp. Laws, §§ 5490–5493. *First Nat. Bank* v. *Peavy Ele-*

vator Co., 10 S. Dak. 167 (72 N. W. Rep. 402). A corporation having power to own real estate may lease it to be used in a business which its charter does not authorize it to carry on; and the fact that such a lease is made to the directors of the corporation does not render it void. *Nye* v. *Storer*, 168 Mass. 58 (46 N. E. Rep. 402). A lease of the entire plant and property of a corporation for a period of ten years, the lessee to carry on the business for which the corporation was organized, authorized by its board of directors and a majority of its stockholders, is valid although executed against the will of the minority of the stockholders. *Bartholomew* v. *Derby Rubber Co.*, 69 Conn. 521 (38 Atl. Rep. 45; 61 Am. St. Rep. 57). N. C. Code, § 685, invalidates as to existing creditors every conveyance made by a corporation. *Langston* v. *Greenville Land & Imp. Co.*, 120 N. C. 132 (26 S. E. Rep. 644). A mortgage executed in the name of a corporation by its duly authorized attorney in fact, purporting to be under its seal, will not be held invalid because the seal attached is only a scroll and not the regularly adopted corporate seal. *Thayer* v. *Nehalem Mill Co.*, 31 Or. 437 (51 Pac. Rep. 202). Where one claims under a deed signed by persons purporting to be the trustees of the corporation, but executed without its corporate seal, it is incumbent on him to show affirmatively that the deed was executed by authority of a resolution of the board of directors entered on the records of the corporation, or that it was ratified by such a resolution. *Barney* v. *Pforr*. 117 Cal. 56 (48 Pac. 987).

Sec. 134. Municipalities—Purchase of real estate. A city or town may acquire land in another city or town for municipal purposes. *City of Somerville* v. *City of Waltham*, 170 Mass. 160 (48 N. E. Rep. 1092). It is held that a county is not a municipal corporation and that a conveyance of land by it is void unless made under legislative authority. Miss. Code 1880, § 2144; Code 1892, § 304, construed and applied. *Jefferson Co.* v. *Grafton*, 74 Miss. 435 (21 So. Rep. 247; 60 Am. St. Rep. 516; 36 L. R. A. 798). A board of county commissioners can, under the constitution and the laws of Idaho, purchase real estate necessary for the county, without submitting the question of making such purchase to the

voters, when they can do so out of the revenue for the year, and not encroach upon such part of said fund as is required to pay the indebtedness created during the year for ordinary and necessary expenses. The purchase of a site upon which to build a county court house is not an ordinary and necessary expense. Idaho Rev. Stat. § 1759, construed and applied. *Ball* v. *Bannock Co.*, Idaho (51 Pac. Rep. 454). A municipal corporation, unless restrained by some statute, may lawfully purchase on credit or otherwise and hold all such real estate as may be necessary to the proper exercise of any power specifically conferred or essential to those purposes of municipal government for which it is created. *Richmond & W. P. Land, N. & Imp. Co.* v. *Town of Westpoint*, 94 Va. 668 (27 S. E. Rep. 460). *Citing, Ketchum* v. *City of Buffalo*, 14 N. Y. 359; *Nashville* v. *Ray*, 19 Wall. 468. N. J. Laws 1892, p. 452, construed and applied—purchase of lands by villages for sewage purposes. *Village of South Orange* v. *Inhabitants of Milburn*, N. J. L. (36 Atl. Rep. 29).

Sec. 135. Municipalities—Contracts, conveyances and liabilities concerning real estate. A municipal corporation may, by contract, grant to an individual the right to construct a sewer in its streets which may be used by property owners under contracts with him. *Stevens* v. *City of Muskegon*, 111 Mich. 72 (69 N. W. Rep. 227; 36 L. R. A. 777). In the absence of a statute authorizing it to do so, a county has no power to execute a deed with covenants of warranty. *Harrison* v. *Palo Alto Co.*, 104 Ia. 383 (73 N. W. Rep. 872). A county is liable for the return of purchase money received by it, on account of a sale of land to which it had no title, effected by its officers' fraudulent representations. *Nelson* v. *Hamilton Co.*, 102 Ia. 229 (71 N. W. Rep. 206). But no action lies against a county on account of failure of title, where it is guilty of no fraud in making the conveyance. *Harrison* v. *Palo Alto Co.*, 104 Ia. 383 (73 N. W. Rep. 872.

Sec. 136. Reversion of land of an extinct corporation. Land conveyed to a corporation in fee, does not revert to the grantor or his heirs on extinction of the corporation; and this is true although the life of the corporation is limited

by statute. *Wilson* v. *Leary*, 120 N. C. 90 (26 S. E. Rep. 630; 58 Am. St. Rep. 778; 38 L. R. A. 240). Overruling, *Fox* v. *Horah*, 36 N. C. (1 Ired. Eq.) 358 (36 Am. Dec. 48). The court say: "It is true, it was held in an opinion by Gaston, J., in *Fox* v. *Horah*, 36 N. C. 358, that by the common law, upon the dissolution of a corporation by the expiration of its charter or otherwise, its real property reverted to the grantor, its personal property escheated to the state, and its choses in action became extinct; and hence that, on the expiration of the charter of a bank, a court of equity would enjoin the collection of notes made payable to the bank or its cashier, the debtors being absolved by the dissolution. Judge Thompson (5 Thomp. Corp. § 6720) refers to this decision 'in accordance with the barbarous rule of the common law' as 'probably the last case of its kind,' and notes that it has since been, in effect, overruled in *Von Glahn* v. *De Rosset*, 81 N. C. 467, and it is now expressly overruled by us. Chancellor Kent (2 Kent Comm. 307, note) says, 'This rule of the common law has, in fact, become obsolete and odious,' and elsewhere he stoutly denied that it had ever been the rule of the common law, except as to a restricted class of corporations. 5 Thomp. Corp. § 6730. The subject is thoroughly discussed by Gray on Perpetuities, §§ 44–51, and he demonstrates that my Lord Coke's doctrine rested on the dictum of a fifteenth century judge (Mr. Justice Choke, in the Prior of Spalding's case [1467] 7 Edw. IV., 10–12), and is contrary to the only case deciding the point (*Johnson* v. *Norway* [1622] Winch, 37), though Coke's statement has often been referred to as law. But, whatever the extent of this rule at common law, if it was the rule at all it was not founded upon justice and reason, nor could it be approved by experience, and has been repudiated by modern courts. The modern doctrine is, as held by us, that 'upon a dissolution the title to real property does not revert to the original grantors or their heirs, and the personal property does not escheat to the state.' 5 Thomp. Corp. § 6746; *Owen* v. *Smith*, 31 Barb. 641; *Towar* v. *Hale*, 46 Barb. 361. The crude conceptions of corporations naturally entertained in a feudal and semi-barbarous age, when they were few in number, and insignificant in value and functions, by even so able a man as Sir Edward Coke, and the

fanciful reason given by him (Co. Litt. 186) for the reverter of their real estate, to-wit, that a conveyance to them must necessarily be a qualified or base fee, have long since become outworn and discredited."

Sec. 137. Miscellaneous notes. The right to loan money is included in the general powers of a corporation. *Brown* v. *Elwell*, 17 Wash. 442 (49 Pac. Rep. 1068). A corporation with legal capacity to hold property, may take and hold it in trust in the same manner and to the same extent as private individuals. *White* v. *Rice*, 112 Mich. 408 (70 N. W. Rep. 1024). Where a corporation assumes a contract for the purchase price of land, held by one of its members at the time he was taken into its organization, it is bound by the terms of the contract. *Stewart* v. *Norman*, Tenn. (39 S. W. Rep. 758). Cal. Civ. Code, § 689, construed and applied—organization of corporations for the improvement of real property. *Vercoutere* v. *Golden State Land Co.*, 116 Cal. 410 (48 Pac. Rep. 375). In an action for the recovery of a proper proportion of the value of real property retained and used by a county from the territory of which the territory of another county has been segregated, it is no defense to show that said real property was originally conveyed by a deed with conditions, when thereafter the said property was dedicated as county property by a plat duly recorded by the grantor, and as such was accepted by the county, and at great expense, improved by the erection thereon of county buildings. *Brown Co.* v. *Rock Co.*, 51 Neb. 277 (70 N. W. Rep. 948).

COVENANTS.

EPITOME OF CASES.

Sec. 138. Personal covenants—Covenant of husband joining in his wife's deed. A husband living with his wife on her separate real estate, who is allowed to pay the taxes, make repairs and perform such duties of care and management as are incidental to the occupation of the property and usually grow out of the marital relations, and who negotiates for her

a contract of sale which is made in her own name and check given to him for the purchase price, does not thereby acquire such possession of her real estate that his mere joinder in his wife's conveyance makes his covenants run with the land. *Mygatt* v. *Coe*, 152 N. Y. 457 (46 N. E. Rep. 949). The court say: "The rule that the covenant of a stranger to the title is personal to the covantee, and incapable of transmission by a mere conveyance of the land, must, in the absence of special facts and circumstances, apply to a husband who becomes a party to a deed by his wife conveying her own land."

Sec. 139. Covenants running with the land. Covenants in party wall contracts run with the land. *Kimm* v. *Griffin*, 67 Minn. 25 (69 N. W. Rep. 634; 64 Am. St. Rep. 385). Applying Cal. Civ. Code §§ 1113, 1460, it is held that a covenant against incumbrances does not run with the land. *Woodward* v. *Brown*, 119 Cal. 283 (51 Pac. Rep. 2; 63 Am. St. Rep. 108). Stipulations made by a railroad company in proceedings to condemn a right of way, for the purpose of reducing the assessment of damages against it, that it will construct crossings for the land owner and permit him to construct a switch over or from its track, constitute covenants which run with the land. *Lyon* v. *Hammond & B. I. R. Co.*, 167 Ill. 527 (47 N. E. Rep. 775). A mortgage may contain, by express words to that effect, an independent covenant which runs with the land and survives the mortgage after the payment and discharge of the debt secured. *Brown* v. *O'Brien*, 168 Mass. 484 (47 N. E. Rep. 195). Covenants running with the land will pass by a quitclaim deed. *Walton* v. *Campbell*, 51 Neb. 788 (71 N. W. Rep. 787). Possession, under claim of title, is an estate sufficient for the transmission of covenants that run with the land when that possession goes by deed from one to another and is of such a character that it would ripen into title in the requiste time. *Morton* v. *Thompson*, 69 Vt. 432 (38 Atl. Rep. 88). In Iowa it is held that the use of the word "heirs" or "assigns" is not necessary to pass a covenant running with the land; and a covenant in a mortgage for the release of certain portions of the mortgaged property upon payment of a specified sum runs with the land. *Gammel* v. *Goode*, 103 Ia. 801 (72

N. W. Rep. 531). Citing, *Vawter* v. *Crafts*, 41 Minn. 14 (42 N. W. Rep. 483). The interest of a covenantee in a covenant which runs with the land passes to a purchaser at a foreclosure sale made under a mortgage executed by such covenantee. *Baker* v. *Bradt*, 168 Mass. 58 (46 N. E. Rep. 409). A covenant against incumbrances runs with the land, and, where the mortgage contains such a covenant, an action upon it can be maintained by a purchaser at a foreclosure sale under the mortgage. *Security Bank* v. *Holmes*, 68 Minn. 538 (71 N. W. Rep. 699). Following *Security Bank* v. *Holmes*, 65 Minn. 58 (68 N. W. Rep. 118; 60 Am. St. Rep. 495).

Sec. 140. Covenants of warranty. Where a grantee to whom land has been conveyed by warranty deed reconveys to his grantor with covenant of warranty, the warranties are mutually extinguished. *Green* v. *Edwards*, 15 Tex. Civ. App. 1005 (39 S. W. Rep. 1005). Where a grantee in a deed covenanting against taxes, after the delivery to him of a deed, and upon the same day, executed to his grantor a mortgage in which he expressly agreed to pay all taxes "then subsisting," it is held that in the absence of fraud or mistake that the covenant in his mortgage to pay the taxes may be held to supercede the original covenant of his grantor and release the latter from liability on account thereof. *Frank* v. *Cobban*, 20 Mont. 168 (50 Pac. Rep. 423). An action for the breach of the covenant of warranty in a deed of real estate is maintainable by the grantee, although the deed in question and the mortgage back from the grantee to the defendant, are part of the same transaction, and contained the same covenants of warranty, and although the relation of mortgagor and mortgagee still subsists between the parties. *Harrington* v. *Bean*, 89 Me. 470 (36 Atl. Rep. 986). Citing, *Hardy* v. *Nelson*, 27 Me. 526; *Hubbard* v. *Norton*, 10 Conn. 422. A grantee in a warranty deed, who subsequently discovers that the title to the land is outstanding in the government, is under no obligation to advise his grantor of that fact, or to enter the land to obtain title, and the fact that his son subsequently enters the land and acquires title from the government and evicts his father, does not *prima facie* show a collusive eviction so as to defeat an action by the father for a

breach of the warranty. *Frix* v. *Miller*, 115 Ala. 476 (22 So. Rep. 146). The United States is a person within the meaning of a covenant against "all and every person or persons whomsoever claiming, or to claim the same." *Giddings* v. *Holter*, 19 Mont. 268 (48 Pac. Rep. 8).

Sec. 141. Covenants against incumbrances. A covenant against incumbrances is, in effect, that the premises then are free from incumbrances; and if any incumbrance exist the covenant is broken and a cause of action exists in favor of the covenantee. *Bellamy* v. *Chambers*, 50 Neb. 146 (69 N. W. Rep. 770). A wife's inchoate interest which may ripen into title in case she survives her husband, is an incumbrance on the land previously conveyed by him alone within the covenant against incumbrances. *Crowley* v. *C. N. Nelson Lum. Co.*, 66 Minn. 400 (69 N. W. Rep. 321). The fact that a grantee of a city lot cannot obtain proper sewer connections for his building without the payment of a municipal assessment which had not become a lien on the property at the time of the conveyance, does not constitute a breach of covenant against incumbrances. *Bumstead* v. *Cook*, 169 Mass. 410 (48 N. E. Rep. 767; 61 Am. St. Rep. 293). Where in a deed or a mortgage, it is recited that the real property therein described is sold or mortgaged subject to certain specified existing incumbrances, such recital qualifies a subsequent covenant of seisin, quiet enjoyment, and of general warranty, and they do not cover or embrace the encumbrances mentioned. *Walther* v. *Briggs*, 69 Minn. 98 (71 N. W. Rep. 909). A special warranty following a general covenant against incumbrances will not limit such covenant. *Duroe* v. *Stephens*, 101 Ia. 358 (70 N. W. Rep. 610). Citing, *Morrison* v. *Morrison*, 88 Ia. 78; *King* v. *Kilbride*, 58 Conn. 109 (19 Atl. Rep. 519); *Bender* v. *Fromberg*, 4 Dall. 436; *Brown* v. *Tomlinson*, 2 G. Greene 525; *Alexander* v. *Schreiber*, 10 Mo. 460; *Duvall* v. *Craig*, 2 Wheat. 44; *Rowe* v. *Heath*, 23 Tex. 614; *Crum* v. *Loud*, 23 Ia. 219. A warrantee is not entitled to recover for a breach of warranty on account of incumbrances, the validity of which is involved in litigation, and which he voluntarially paid over the objection of the warrantor, before the latter had exhausted all of his legal remedies. *Tuggle* v. *Hamilton*, 100 Ga.

292 (27 S. E. Rep. 987). In an action for a breach of covenant against incumbrances on account of the existence of an easement of right of way for the obstruction of which by the erection of buildings the plaintiff has been compelled to pay damages, bad faith is not shown on his part by proof that the wife of one interested in the easement told the plaintiff at the time he began the building that he was encroaching on the easement, to whom he replied that he was within the calls of his deed, as he actually was. *Richmond* v. *Ames*, 167 Mass. 265 (45 N. E. Rep. 919). In order for unpaid taxes to consitute a breach of the covenant against incumbrances, it must appear that they were lawfully assessed and this fact is not established by the introduction of a collector's tax deed of the premises reciting that the land was sold for unpaid taxes "assessed agreeably to law," the statutes (Me. Rev. Stat., ch. 6, § 205; Stat. 1894, ch. 314; Stat. 1895, ch. 70) creating a presumption in favor of the validity of tax sales upon the production of the collector's deed having no application to an action of this character. *Maddocks* v. *Stevens*, 89 Me. 336 (36 Atl. Rep. 898). By the statute of North Dakota "the term 'incumbrances' includes taxes, assessments and all liens upon real property;" and one who conveys land with covenant "that it is free from all incumbrances" is liable for all damages sustained in removing any incumbrance of record, whether known to him or not. Rev. Codes § 3549, amended, Laws 1899, p. 116.

Sec. 142. Covenants against incumbrances—Outstanding lease as a breach. Where a grantee in a conveyance of lands and premises in fee simple, which contains a covenant against incumbrances, before he enters into negotiations for the purchase, and before the execution and delivery of the deed of conveyance has actual knowledge of the existence of a lease of said lands made between the grantor in said conveyane and the tenant, in which the rent is reserved to the grantor and his assigns, the tenant being in actual possession of the premises, the grantee cannot maintain against his grantor an action for the breach of such covenant. *Demars* v. *Koehler*, 60 N. J. L. 314 (38 Atl. Rep. 808). The court say: "There can exist no question in law

but that an outstanding term or an unexpired lease on the premises conveyed is an incumbrance, within the covenant against incumbrances contained in a deed of conveyance. *Fritz* v. *Pusey*, 31 Minn. 368 (18 N. W. Rep. 94); *Jarvis* v. *Butterick*, 1 Metc. (Mass.) 480; *Batchelder* v. *Sturgis*, 8 Cush. 201; *Carter* v. *Denman's Ex'rs*, 23 N. J. L. 261–272; *Grice* v. *Scarborough*, 2 Spears 545 (42 Am. Dec. 391); Maupin, Real Est. p. 293, § 125. * * * But when the conveyance is taken with the knowledge that the land is in possession of a lessee, the existence of the lease will not, under a statute transferring the constructive possession to the grantee without attornment by the tenant, operate as a breach of the covenant. *Kellum* v. *Insurance Co.*, 101 Ind. 455. Nor is it apprehended that it will so operate, independently of statute, where there is an actual attornment by the tenant, or an apportionment of rent between the parties. Rawle Cov. (5th Ed.) § 78; *Haldane* v. *Sweet*, 55 Mich. 196 (20 N. W. Rep. 902). And generally it may be said that if the purchaser knows that the premises are in the possession of a tenant, and no special contract is made, the occupant becomes the tenant of the purchaser, and there will be no breach of covenant against incumbrances. *Lindley* v. *Dakin*, 13 Ind. 388; *Page* v. *Lashley*, 15 Ind. 152; Maupin Real Est. p. 298; *Weld* v. *Traip*, 14 Gray 330."

Sec. 143. Breach of warranty—Eviction. A covenant of warranty is broken at the time of the execution of a conveyance containing it, where at that time a portion of the land conveyed is in the adverse possession of another claiming paramount title. *Ilsley* v. *Wilson*, 42 W. Va. 757 (26 S. E. Rep. 551). An action cannot be maintained on a covenant of warranty or for quiet enjoyment, unless there has been an eviction or surrender by reason of the paramount title. *Troxell* v. *Johnson*, 52 Neb. 46 (71 N. W. Rep. 968). If the paramount title is only an outstanding right to an easement in the premises conveyed, which naturally impairs the value of the estate, and interferes with the use and possession of some portion of it, the covenant for quiet enjoyment or of warranty is held to be broken, although there is not a technical, physical ouster from the actual possession of any portion

of it. It is deemed an eviction *pro tanto*. *Harrison* v. *Bean*, 89 Me. 470 (36 Atl. Rep. 986). Citing, *Lamb* v. *Danforth*, 59 Me. 322 (8 Am. Rep. 426); *Clark* v. *Conroe's Estate*, 88 Vt. 469; *Russ* v. *Steele*, 40 Vt. 310; *Scriver* v. *Smith*, 100 N. Y. 471 (3 N. E. Rep. 675).

Sec. 144. Breach of covenants—Measures of damages. Only nominal damages can be recovered for breach of warranty in a deed conveying standing timber, where the grantee has cut all the timber which stood on the land when the deed was made. *Britton* v. *Ruffin*, 120 N. C. 87 (26 S. E. Rep. 642). The measure of damages for a breach of warranty in a deed, is the amount of consideration paid for the premises, with interest, and reasonable costs and expenses in resisting the eviction. *Webb* v. *Holt*, 113 Mich. 338 (71 N. W. Rep. 637). For application of this rule in particular case, see *Walton* v. *Campbell*, 51 Neb. 788 (71 N. W. Rep. 787). Where, prior to a conveyance of land by warranty deed, at a certain price per foot frontage, a considerable portion of the land conveyed was taken for a public highway, the grantee is entitled to recover from the grantor, as for failure of title, the agreed price per foot frontage, for the number of feet taken by the road, with interest from the date of his final payment on the land. *Haynie* v. *American Trust Inv. Co.*, Tenn. (39 S. W. Rep. 860). The right of a covenantee to recover attorney fees on account of a previous action in which a judgment of ouster was rendered against him, is limited to the fees actually paid by him. *Cullity* v. *Dorffel*, 18 Wash. 122 (50 Pac. Rep. 982). Where the breach of the covenant of warranty and the covenant against incumbrances is the existence of a perpetual easement which the covenantee cannot remove, he is entitled to recover as damages the difference between the value of the premises with and without the easement, with interest from the date of the conveyance to him. *Harrington* v. *Bean*, 89 Me. 470 (36 Atl. Rep. 986). Damages for breach of a covenant of title to buildings sold by a purchaser from a lessee, should be assessed upon the basis of a total failure of title, where the original lessee who erected the buildings had only a right to be re-imbursed as to part of their cost. *Handy* v. *Aldrich*, 168

Mass. 84 (46 N. E. Rep. 429). A grantee can recover only nominal damages for a breach of covenant against incumbrances arising from the existence of a mortgage which has not disturbed his possession and which he has not paid, where his title has been extinguished by a foreclosure sale in pursuance of his subsequent mortgage, it not appearing that the existence of the mortgage constituting the breach, injuriously affected his interests in the making of such foreclosure sale. *McGuckin* v. *Milbank*, 152 N. Y. 297 (46 N. E. Rep. 490).

Sec. 145. Breach of covenant of seisin—Measure of damages. A covenant of seisin, if broken at all, is broken the instant it is made, and an immediate right of action accrues to the purchaser to sue for the breach. His measure of damages is the consideration paid with interest, where there is an entire failure of title. *Haynie* v. *American Trust. Co.*, Tenn. (39 S. W. Rep. 860). The covenant is personal and if broken is broken the instant it is made and an immediate right of action accrues to the vendee for its breach without and before eviction. If the breach be total, or such that the vendee may so treat it, ordinarily the measure of damages is the amount of consideration paid with interest thereon, subject to a deduction for rents during the vendee's possession, when it appears that he cannot be made liable therefor to the owner of the paramount title. A decree awarding damages for a total breach should provide for the restoration of the possession of the land; and where possession is surrendered to a grantor who had only a life estate, the vendee is entitled to recover for improvements to the extent that they have permanently enhanced the rental or usable value of the life estate. *Curtis* v. *Brannon*, 98 Tenn. 158 (38 S. W. Rep. 1078). On a partial breach of the covenant of seisin, where the possession of the covenantee has never been disturbed, as a general rule, subject to certain exceptions, he will be entitled to recover as damages that proportion of the whole consideration (without interest) which the part lost bears to the full title attempted to be conveyed. *Bolinger* v. *Brake*, 57 Kan. 663 (47 Pac. Rep. 537).

Sec. 146. Action for breach of covenant—Pleading and practice. In an action on a covenant of warranty, a

judgment of ouster rendered against the covenantee, is not admissible in evidence against the grantor to show paramount title, where the complaint does not allege that the grantor was notified and requested to defend the title in the former action. *Cullity* v. *Dorffel*, 18 Wash. 122 (50 Pac. Rep. 982). A subsequent incumbrancer may prosecute a cross complaint based upon his grantor's covenant against incumbrances in an action brought to foreclose a mortgage which constitutes a breach thereof, where such grantor is a party to the action. *Duroe* v. *Stephens*, 101 Ia. 358 (70 N. W. Rep. 610). Va. Code 1887, § 2415, construed and applied—action on covenant in a deed by one not a party to it. *Newberry Land Co.* v. *Newberry*, 95 Va. 119 (27 S. E. Rep. 899).

CROPS AND EMBLEMENTS.

EPITOME OF CASES.

Sec. 147. Title to growing crops. A purchaser at a foreclosure sale who has an adequate remedy at law, is not entitled to an injunction against a tenant in possession at the expiration of the period of redemption, to prevent him from moving crops off the land. *Marks* v. *Jones*, 71 Minn. 186 (73 N. W. Rep. 719). During the pendency of an appeal by a tenant in possession contesting the right to sell, the purchaser of land at administrator's sale is not entitled to the crops and rents. *Pearson* v. *Gillenwaters*, 99 Tenn. 446 (42 S. W. Rep. 9; 63 Am. St. Rep. 844). Where, after the commencement of an action to foreclose a mortgage given by one cotenant upon his interest in the common estate and the filing of a *lis pendens*, another cotenant in possession of the premises mortgages the crops raised thereon, it is held that the rights of a purchaser at a foreclosure sale in the crops is not affected by the mortgage given thereon. *Moreland* v. *Strong*, 115 Mich. 211 (73 N. W. Rep. 140). Under the laws of Tennessee, the growing crops of any year cannot be levied upon by creditors before November 15th of the year, and they cannot complain of any disposition made of the crop before that time by

the debtor. *Layman* v. *Denton*, Tenn. (42 S. W. Rep. 158). Miss Code 1892, ch. 75, applied—lien of overseer or manager of plantation, on crops. *McCormick* v. *Blum*, 75 Miss. 81 (21 So. Rep. 707).

CURTESY AND DOWER.

EPITOME OF CASES.

Sec. 148. Curtesy of husband. Curtesy cannot attach to a mere life estate, *Bigley* v. *Watson*, 98 Tenn. 353 (39 S. W. Rep. 525; 38 L. R. A. 679); or to a mere possessory right in lands, *Brown* v. *Watkins*, 98 Tenn. 454 (40 S. W. Rep. 480). Except as to the mortgagee, a husband does not release his right of curtesy by joining with his wife in a mortgage of her land. *Baker* v. *Baker*, 167 Mass. 575 (46 N. E. Rep. 391). A judgment in ejectment against a tenant by the curtesy is not conclusive as against the remaindermen. *Lineberger* v. *Newkirk*, 179 Pa. St. 117 (36 Atl. Rep. 198). In Arkansas it is held that a husband's estate by curtesy is superior to the rights of his wife's judgment creditors, although they might have extinguished his estate during her life by a sale of the land on execution. *Hampton* v. *Cook*, 64 Ark. 353 (42 S. W. Rep. 585; 62 Am. St. Rep. 194). Mass. Laws 1886, ch. 245, §§ 1,2—release of estate of curtesy by guardian of insane husband—amended, Laws 1899, p. 179.

Sec. 149. Right of dower—Conveyance—Liability for debts. A widow in possession of mortgaged land in which she has an unassigned right of dower, is entitled to the profits thereof undiminished by any set off on account of interest accruing upon the mortgage during the time of her possession *Becker* v. *Carey*, N. J. Eq. (36 Atl. Rep. 770). In South Carolina, a widow, although entitled to dower in her deceased husband's land, may become a trespasser on the homestead after forty days from his death. *Cave* v. *Anderson*, 50 S. C. 293 (27 S. E. Rep. 698). Prior to Mo. Rev. Stat. 1889, § 4514, a widow could not, at law, alienate her dower

right by conveyance or assignment, to one holding no interest in the land. *Sell* v. *McAnaw*, 138 Mo. 267 (39 S. W. Rep. 779); *Carey* v. *West*, 139 Mo. 146 (40 S. W. Rep. 661). A mortgage of premises by one having unassigned dower right therein, conveys no title. *Ritt* v. *Dodge*, 20 R. I. 133 (37 Atl. Rep. 810). Where lands, subject to dower, were partitioned by means of a sale, and the decree provides that the income from one-third of the proceeds shall be secured to the widow, her interest remains that of a life tenant and can only be subjected to claims of her creditors under proceedings authorizing the sale of life estates. Pa. Act, Oct. 13, 1840; Act, Jan. 24, 1849, applied. *Kunselman* v. *Stine*, 183 Pa. St. 1 (38 Atl. Rep. 414). Where, at the instance of the creditors of a failing debtor, the court appoints a receiver to procure an assignment of dower to which he is entitled and subject it to the payment of his debts, all parties interested being made parties, the decree and proceedings thereunder are binding unless appealed from. *Doty* v. *Irwin*, 168 Ill. 50 (47 N. E. Rep. 768).

Sec. 150. Lands subject to dower. A widow cannot claim dower under Mass. Pub. Laws, ch. 124, § 3, in lands of which her husband was vested with an estate in reversion only. *Baker* v. *Baker*, 167 Mass. 575 (46 N. E. Rep. 391), citing *Watson* v. *Watson*, 150 Mass. 184 (22 N. E. Rep. 438), which holds that dower cannot be claimed in a vested remainder held by a husband where he dies before the termination of the intervening freehold estate. This was the rule at common law. *Durando* v. *Durando*, 23 N. Y. 331; *House* v. *Jackson*, 50 N. Y. 161; Sharswood & Budd's Leading Cases Law Real Prop. Vol. I, p. 317. Under Mo. Rev. Stat. 1889, § 4513, a widow is entitled to dower in lands of which her husband acquired the equitable title during his life by the payment of the purchase money. *Howell* v. *Jump*, 140 Mo. 441 (41 S. W. Rep. 976). A widow's right to dower in land conveyed by her husband, by a conveyance in which she did not join, is not affected by his fraudulent representations to the effect that he was an unmarried man. *McLanahan* v. *Griffin*, 168 Ill. 31 (48 N. E. Rep. 315).

Sec. 151. Dower in mortgaged lands—Rule in South Carolina. In the recent case of *Miller* v. *Farmers' Bank*, 49 S. C. 427 (27 S. E. Rep. 514; 61 Am. St. Rep. 821), the supreme court of South Carolina say: "From the decisions rendered by the courts of last resort in this state, the following principles are deduced: (1) If at the time of coverture, there are incumbrances on the land, and there is a judicial sale of the land during coverture, to satisfy such incumbrances, the wife is regarded as in privity of the estate with her husband, and whatever rights she may have are transferred to the surplus proceeds of sale after payment of the incumbrances; but she has no right to have her dower set off to her in the land thus sold. (2) If at the time of, or during coverture, the title of the husband is complete and unincumbered, and he afterwards mortgages the land, the wife is not a privy in estate with her husband, and her right to claim dower in the land is paramount to that of the mortgagee. In such case her rights are not transferred to the surplus proceeds of sale if the mortgage is foreclosed during the lifetime of her husband, but after his death she can have dower assigned her in the land itself. (3) If the title of the husband is complete, and during coverture he executes a mortgage on the land upon which the wife renounces her dower, and the mortgage is foreclosed during coverture, she, by her own act, did that which as effectually deprives her of the right to claim dower in the land as if the mortgage had been for the purchase money of the land, or had been a subsisting lien at the time of marriage. In all these cases the rights of the purchaser are paramount to the wife's claim of dower. When the wife renounces dower in the land, she, by her own act, places herself in privity of estate with her husband. (4) In cases where the rights of the wife are in privity with those of her husband in the land, and the land is sold under a judgment of foreclosure proceedings, and after the death of her husband, she has no right to claim dower in the land. (5) When a wife renounces dower on one mortgage, and there are other mortgages, as in this case, under all of which the land is sold during coverture, the wife, after the death of her husband, is not entitled to relief against the purchaser of the land on the ground that the renunciation of

dower was for the benefit alone of that mortgage upon which the dower was renounced, and only postponed the satisfaction of that mortgage."

Sec. 152. Release, loss or waiver of dower. Dower can only be released by writing under seal, duly acknowledged. *Jarrell* v. *French*, 48 W. Va. 456 (27 S. E. Rep. 263). A purchaser of land charged with dower, has the burden of showing that the dower claimed has been released. *Gay* v. *Lockridge*, 43 W. Va. 267 (27 S. E. Rep. 306). Particular evidence held insufficient to authorize the setting aside of a release of dower executed by a wife to her husband. *McKenzie* v. *Sifford*, 48 S. C. 458 (26 S. E. Rep. 706). A widow's right to dower is not affected by a sheriff's sale of her husband's land on a judgment against him. *Lynde* v. *Wakefield* 19 Mont. 28 (47 Pac. Rep. 5). A widow's right of dower in her husband's land, given by Neb. Comp. Stat. ch. 23, is not barred by his administrator's sale of the land to pay debts, where the record of the proceedings ordering the sale shows that the decedent left a widow; and the fact that she was a party to such proceedings but neglected to appear, and attended the sale without making any assertion of her dower right, does not estop her to afterwards claim it. Nor is she estopped from asserting such dower right because she received a part of the proceeds of such sale as her "distributive share of such estate," such payment not having been made to her or received by her in lieu of her dower estate. *Motley* v. *Motley*, 53 Neb. 875 (73 N. W. Rep. 788). Particular stipulation in a decree for alimony held to bar dower. *McKelvey* v. *McKelvey*, 112 Mich. 274 (70 N. W. Rep. 582). A lawful wife is not estopped to claim dower in her husband's real estate because she had knowledge of his living with another woman for several years before his death who believed herself to be his lawful wife. *Dunn* v. *Portsmouth Sav. Bank*, 103 Ia. 538 (72 N. W. Rep. 687) A wife who separated from her husband and lived in adultery with another, cannot assert a claim for dower, as against the right of a third party, to have compensation for caring for the husband in his last illness. *Davis* v. *Calvert*, Ky. (38 S. W. Rep. 884). Me. Laws 1895, ch. 157, § 6—release of dower—amended, Laws

1899, p. 14. In Michigan, any resident married woman of the age of 18 years may release her right of dower by joining in her husband's conveyance, "and may do any other act concerning rights in lands owned by her husband which she might do if she were twenty-one years of age." Laws 1899, p. 284.

Sec. 153. Assignment of dower. Dower must be assigned according to the statute in force at the time of the husband's death. *Carey* v. *West*, 139 Mo. 146 (40 S. W. Rep. 661). It is error to decree a specific sum in lieu of dower, without the assent of all parties interested. *Jarrell* v. *French*, 43 W. Va. 456 (27S. E. Rep. 263). Dower should be assigned to widow before an unconditional sale of his real estate to pay debts is ordered, unless she has elected to take the value of her dower in money. *McKittrick* v. *McKittrick*, 43 W. Va. 117 (27 S. E. Rep. 303). In an action by a widow to recover dower in lands sold under execution against her husband during the marriage, all persons claiming an interest therein are proper parties. Her complaint need not negative the idea that she has accepted a testamentary provision in lieu of dower. *Sanders* v. *Wallace*, 114 Ala. 259 (21 So. Rep. 947). In the assignment of dower the commissioners should regard the productive value of the real estate, and when they have ascertained the annual income of the whole estate, they ought to set off to the widow such a part as will yield her one-third part of such income. *Fuller* v. *Conrad's Adm'r.*, 94 Va. 233 (26 S. E. Rep. 575). Citing, *Leonard* v. *Leonad*, 4 Mass. 533. Where it is impracticable to allot dower to a wife in lands conveyed by her husband by metes and bounds, she may be awarded a gross sum representing the present value of her estate, based upon the value of the property at the time of its alienation. Applying Ky. Stat. 1894, § 2139, it is held that she may have a personal judgment against the vendee for such an allowance with interest from the commencement of the action. *Hogg* v. *Hensley*, 100 Ky. 719 (39 S. W. Rep. 247). The doctrine of *Burt* v. *Cook Sheep Co.*, 10 Mont. 571 (reported in full Ballards' Law of Real Property, Vol. 2, §§ 90–92), relating to the application of the statute of limitations to an action for dower, is approved and followed in the case of *Lynde*

v. *Wakefield*, 19 Mont. 28 (47 Pac. Rep. 5). Me. Rev. Stat. ch. 103, § 22, sufficiency of report of commissioners—recommital of report—writ of seisin. *Skolfield* v. *Skolfield*, 90 Me. 571 (88 Atl. Rep. 530.) Neb. Comp. Stat. ch. 28, §§ 8–11, construed and applied—jurisdiction of county court to assign dower. *Clemons* v. *Helehan*, 52 Neb. 287 (72 N. W. Rep. 270). Under R. I. Gen. Laws, ch. 264, § 28, upon the waiver of the right to appeal from a decree assigning dower, it becomes final. *Hammond* v. *Hammond*, 19 R. I. 400 (37 Atl. Rep. 14).

Sec. 154. Death of widow pending action to determine dower rights. Applying Mont. Code Civ. Proc., § 22, it is held that where a widow dies pending an action brought by her for dower and for rents and profits, the right to collect the rents and profits of the dower estate survives to her personal representative. *Lynde* v. *Wakefield*, 19 Mont. 28 (47 Pac. Rep. 5). Citing, *Pollitt* v. *Kerr*, 49 N. J: Eq. 65 (22 Atl. Rep. 800); *Curtis* v. *Curtis*, 2 Brown Ch. 620; *Magruder* v. *Smith*, 79 Ky. 512; *McLauglin* v. *McLaughlin* 20 N. J. Eq. 190; *Paul's Ex'rs* v. *Paul*, 86 Pa. St. 270; *Harper* v. *Archer*, 28 Miss. 212; *Price* v. *Hobbs*, 47 Md. 359. Where, pending an assignee's application to sell the land of her husband, it is adjudged upon the wife's consent that she receive in lieu of her dower interest its value in money, and a determination of the value of such interest is reserved for the further judgment of the court, prior to which determination she dies, it is held that her right to receive dower will be treated as adjudicated and her legal representative will be entitled to receive the value of her dower interest. *Brooks' Assignee* v. *Summers*, 100 Ky. 620 (38 S. W. Rep. 1047).

DANGEROUS PREMISES.

EPITOME OF CASES.

Sec. 155. Liability of owner to his tenant. Where steps to the entrance of a building are used in common by the tenants thereof, a tenant injured on account of a defect in a

step cannot recover damages from his landlord, unless it is shown that he knew of the unsound condition of the step or could have known it by the use of reasonable care. *Lynch* v. *Swan*, 167 Mass. 510 (46 N. E. Rep. 51). Where it does not appear that the landlord warranted the premises free from defects or agreed to keep them in repair at the time of the leasing, he is not liable to his tenant for an injury resulting to him from a defect in the premises which existed at the time of the leasing, although he was afterwards notified of such defect and promised but failed to remedy the same. *Dowling* v. *Nuebling* 97 Wis. 350 (72 N. W. Rep. 871). Where a portion of a building is let and the tenant has the right of the use of the elevator in common with the landlord and other tenants, such elevator to be operated by the tenant when required by his business necessities, and the landlord expressly covenants in the lease that he will keep the elevator and approaches in constant repair and in perfect condition for the lessee's use, and the landlord retains the general control over the elevator and its approaches, there is no such leasing as will exonerate the landlord from all responsibility for the safe condition of the elevator. *Olson* v. *Schultz*, 67 Minn. 494 (70 N. W. Rep. 779; 64 Am. St. Rep. 437; 36 L. R. A. 790). Particular case in which the question whether or not a tenant was guilty of contributory negligence in using defective premises was held to be a question of fact for the jury. *Johnson* v. *Collins*, 98 Ga. 271 (26 S. E. Rep. 744).

Sec. 156. **Liability of owner for injury to servants or visitors of his tenant.** Where a landlord retains possession of a roof, used in common by his tenants in a building for hanging clothes to dry and for other purposes for which the roof of a dwelling house is commonly put, he is liable for injuries resulting from its defective condition, to a servant of one of his tenants while rightfully thereon. *Wilcox* v. *Zane*, 167 Mass. 302 (45 N. E. Rep. 928). Where property, at the time of the demise, is not a nuisance and an injury happens to a third party performing an act for the lessee while he has entire possession and control of the premises, the owner is not liable. *Hanson* v. *Beckwith*, 20 R. I. 165 (37 Atl. Rep. 702; 38 L. R. A. 716). In Massachusetts it is held that a

landlord is not liable for injuries resulting from a defective tenement to one who calls on the tenant for purely business purposes and not on business in which the tenant is engaged. *Ganley* v. *Hall*, 168 Mass. 513 (47 N. E. Rep. 416). One who enters upon a private driveway at the invitation of a tenant, cannot recover from the landowner for injuries resulting to him on account of his frightened horse throwing him into a dangerous excavation on the owners' premises, twenty feet distant from the driveway. *Gorr* v. *Mittelstaedt*, 96 Wis. 296 (71 N. W. Rep. 656). The court say: "Where the dangerous place is so far removed from the boundaries of the premises designed for travel that a traveler thereon, in the exercise of ordinary care, is not liable to be injured, if in fact there is a substantial space between the boundaries of the traveled way and the dangerous place, so that to reach such place the traveler must necessarily wander from or pass wholly outside such traveled way, and become a trespasser, in order to reach the danger, then, as a matter of law, such place cannot be held to be substantially adjoining such way so as to render it unsafe, within the meaning of the rule governing the subject, and a verdict to the contrary by a jury cannot change the fact. Such fact being conclusive, it is the law as well, and not open to consideration by a jury."

Sec. 157. Liability of owner for injury to children. It is not negligence for a landowner to permit surface water to accumulate in a pond on his land without fencing or enclosing the same and he is not liable for the death of a trespassing infant drowned therein. *Peters* v. *Bowman*, 115 Cal. 345 (47 Pac. Rep. 113 ; 56 Am. St. Rep. 106). Citing, *Klix* v. *Nieman*, 68 Wis. 271 (32 N. W. Rep. 228; 60 Am. St. Rep. 854) ; *Overholt* v. *Vieths*, 93 Mo. 422 (6 S. W. Rep. 74; 8 Am. St. Rep. 557); *Hargraves* v. *Deacon*, 25 Mich. 1; *Gillespie* v. *McGowan*, 100 Penn St. 144 (45 Am. Rep. 365) ; *Richards* v. *Connell*, 45 Neb. 467 (63 N. W. Rep. 915.) A waterworks company which maintains upon its grounds deep reservoirs of water, attractive to small boys, who, to its knowledge, and with its permission, resort thereto for fishing and for play, and which takes no reasonable precaution to prevent accidents to them while engaged in such amusements, is liable in damages

if one of them without negligence on his part, falls in and is drowned. *Price* v. *Atchison Water Co.*, 58 Kan. 551 (50 Pac. Rep. 450; 62 Am. St. Rep. 625). Citing, *Car Works* v. *Cooper*, 60 Ark. 545 (31 S. W. Rep. 154; 46 Am. St. Rep. 216); *City of Pekin* v. *McMahon*, 154 Ill. 141 (39 N. E. Rep. 484; 45 Am. St. Rep. 114). Criticising the cases cited above it is held by the supreme court of Texas in the case of *Dobbins* v. *Missouri, K. & T. Ry. Co.*, 91 Tex. 60 (41 S.W. Rep. 62; 66 Am. St. Rep. 856; 38 L. R. A. 578), that the railroad company is not liable for the death of a child, occurring without negligence on the part of its parents, occasioned by its drowning in a pool of water which the company had permitted to remain on its right of way within a few feet of a path leading to its station which path was designed for the use of persons going to and from such station on business, it not appearing that the child was or had been traveling or attempted to travel said path at or just before it got into the pool. The court say: "The common law imposes no duty upon the owner to use care to keep his property in such condition that persons going thereon without his invitation may not be injured. In considering the question as to whether a duty exists, there is no distinction between a case where an infant is injured, and one where the injury is to an adult, though where the duty is imposed the law may exact more vigilance in its discharge as to the former. If there be no duty, the question of negligence is not reached, for negligence can in law only be predicated upon a failure to use the degree of care required of one by law in the discharge of a duty imposed thereby. Since the common law imposes no duty on the railroad to use care to keep its right of way in such condition that persons going thereon without its invitation may not be injured, and since there is no evidence in the record from which the jury could have found such invitation to the child, it was no more liable in law for its death than would have been a neighbor had it wandered onto his uninclosed lands and been drowned in his tank or creek, or been killed by falling down his precipice. Since the principles above stated have been so fully and ably discussed heretofore by many learned jurists, we deem it unnecessary to undertake to elaborate them, but will content ourselves by referring to the opinion of the

court of civil appeals, *Missouri, K. & T. Ry. Co.* v. *Dobbins*, Tex. Civ. App. (40 S. W. Rep. 861), and the following cases decided upon similar facts: *Hargraves* v. *Deacon*, 25 Mich. 1; *Railway Co.* v. *Edwards*, 90 Tex. 65 (36 S. W. Rep. 430; 32 L. R. A. 825); *Moran* v. *Car Co.*, 134 Mo. 641 (36 S. W. Rep. 659; 56 Am. St. Rep. 548; 33 L. R. A. 755); *Charlebois* v. *Railroad Co.*, 91 Mich. 59 (51 N. W. Rep. 812); *Clark* v. *Manchester*, 62 N. H. 577; *Greene* v. *Linton*, 27 N. Y. Supp. 891; *Murphy* v. *City of Brooklyn*, 118 N. Y. 575 (23 N. E. Rep. 887); *Witte* v. *Stifel*, 126 Mo. 295 (28 S. W. Rep. 891; 47 Am. St. Rep. 668); *Galligan* v. *Manufacturing Co.*, 143 Mass. 527 (10 N. E. Rep. 171); *O'Connor* v. *Railroad Co.*, 44 La. 889 (10 So. Rep. 678); *Richards* v. *Connell*, 45 Neb. 467 (63 N. W. Rep. 915); *Benson* v. *Traction Co.*, 77 Md. 535 (26 Atl. Rep. 978; 39 Am. St. Rep. 436; 20 L. R. A. 714); *Sterger* v. *Van Sicklen*, 132 N. Y. 499 (30 N. E. Rep. 987; 28 Am. St. Rep. 594; 16 L. R. A. 640); *Frost* v. *Railroad*, 64 N. H. 220 (9 Atl. Rep. 790; 10 Am. St. Rep. 396); *Klix* v. *Nieman*, 68 Wis. 271 (32 N. W. Rep. 223; 60 Am. Rep. 854); *Oil Co.* v. *Morton*, 70 Tex. 400 (7 S. W. Rep. 756; 8 Am. St. Rep. 611); *Clark* v. *City of Richmond*, 83 Va. 355 (5 S. E. Rep. 369; 5 Am. St. Rep. 281); *Ratte* v. *Dawson*, 50 Minn. 450 (52 N. W. Rep. 965); *City of Indianapolis* v. *Emmelman*, 108 Ind. 580 (9 N. E. Rep. 155)."

Sec. 158. Liability of owner—Defective approaches, entrances or elevators. The owner of a building, constructed and occupied by stores and offices, which the public have an implied invitation to enter, is bound to exercise reasonable care and prudence to provide a safe and suitable entrance to such stores and offices, and to have the approaches thereto so constructed and maintained, that visitors are not liable to step into dangerous pitfalls by reason of misleading doors and deceptive landings. *Foren* v. *Rodick*, 90 Me. 276 (38 Atl. Rep. 175). Citing, *Stratton* v. *Staples*, 59 Me. 94; *Campbell* v. *Sugar Co.*, 62 Me. 552; *Sawyer* v. *McGillicuddy*, 81 Me. 318 (17 Atl. Rep. 124; 10 Am. St. Rep. 260; 3 L. R. A. 458); *Shipley* v. *Associates*, 101 Mass. 251 (3 Am. Rep. 346); *Readman* v. *Conway*, 126 Mass. 374; *Looney* v. *McLean*, 129

Mass. 33 (37 Am. Rep 295); *Learoyd* v. *Godfrey*, 138 Mass. 315; *Gordon* v. *Cummings*, 152 Mass. 513 (25 N. E. Rep. 978); *Hayward* v. *Miller*, 94 Ill. 349 (34 Am. Rep. 229); *Camp* v. *Wood*, 76 N. Y. 92 (32 Am. Rep. 282); *Gillvon* v. *Reilly*, 50 N. J. L. 26 (11 Atl. Rep. 481. Where one without permission or knowledge of the owner of a building was injured by taking passage in an elevator out of repair and not in use, which he operated himself rather than wait for an elevator in active use and supplied with attendants, he is guilty of contributory negligence which prevents his recovering damages from the landowner. *Hansen* v. *State Bank Bldg. Co.*, 100 Ia. 672 (69 N. W. Rep. 1020).

Sec. 159. Liability of owner—Particular cases. An abutting owner is liable to one of the public for an injury occasioned by a post which he planted on the edge of a highway to protect the public from an insecure sewer previously construced by him. *Gunther* v. *Dranbauer*, 86 Md. 1 (38 Atl. Rep. 33). The failure of an owner to enclose a dangerous excavation, as required by a city ordinance, does not render him liable for injuries to a trespasser who has been warned not to go upon the premises. *Butz* v. *Cavanaugh*, 137 Mo. 503 (38 S. W. Rep. 1104; 59 Am. St. Rep. 504). The owner of premises is not relieved from liability for injuries resulting from the fall of a fence thereon, on account of defects in its construction or from want of repair, by reason of the fact that he has granted to another a parol license to use the fence as a bill board. *Chapman* v. *Boardman*, 69 Conn. 93 (36 Atl. Rep. 1007). The owner of a grain elevator is not liable for injuries resulting to a third person, on account of a defecting railing along an approach to the elevator, which occurred on account of his leaning against the railing while engaged in conversation, thus putting it to a use for which it was not intended. *Kinney* v. *Onsted*, 113 Mich. 96 (71 N. W. Rep. 482; 38 L. R. A. 665). If the owner of a lot abutting upon a street of a municipality, for the use of his property, constructs a vault under the sidewalk, over which he negligently places and maintains a defective covering, he is liable directly to a footman injured thereby notwithstanding the omission by the municipality of the duty imposed upon

it by statute to keep the street in repair. *Morris* v. *Woodburn*, 57 O. St. 330 (48 N. E. Rep. 1097) Where the owner of premises upon which there is a defective structure executes and delivers a conveyance thereof, which is delivered to his grantee and the latter takes possession, such owner is not liable for injuries subsequently sustained by one of the public on account of such defective premises. *Palmore* v. *Morris*, 182 Pa. St. 82 (37 Atl. Rep. 995; 61 Am. St. Rep. 693). N. Y. Laws 1892, ch. 678, § 6, construed and applied —duties and liabilites of owner of factory building as to the construction of fire escapes. *Huda* v. *American Glucose Co.*, 154 N. Y. 474 (48 N. E. Rep. 897; 40 L. R. A. 411).

DEDICATION.

EPITOME OF CASES.

Sec. 160. As to what constiutes—General principles. The fact that an owner of vacant and unoccupied land passively acquiesces in the public traveling over it on a certain route, does not show an intention to dedicate, *Tutwiler* v. *Kendall*, 113 Ala. 664 (21 So. Rep. 332); but in Utah it is held that where the public assumed to appropriate land for a public use and the owner interposes no objection, but acquiesces in its continual use by the public for such a length of time that the public convenience and accommodation might be materially affected by an interruption of the enjoyment, an intention to dedicate will be presumed. *Whittaker* v. *Ferguson*, 16 Utah 240 (51 Pac. Rep. 980). After a vendor has executed and recorded his agreement to sell an interest in land to another, he cannot dedicate it for a public square by subsequently filing his plat on which it is designated as such. *South Baltimore Harbor Imp. Co.* v. *Smith*, 85 Md. 587 (37 Atl. Rep. 27). Where one in a conveyance of land refers to adjacent land as a street the conveyance implies a covenant that the purchaser shall have the use of such street whether the consideration is valuable or nominal. *Flersheim* v. *City of Baltimore*, 85 Md. 489 (36 Atl. Rep. 1098). The

validity of a dedication of land for the purpose of a highway is not affected on account of such highway being advantageous to the private interests of the dedicator. *Fairbury Union Ag. Board* v. *Holly*, 169 Ill. 9 (48 N. E. Rep. 149). Where the mortgagee makes no objection, a third person cannot assail the validity of a dedication of land to highway purposes, on the ground that the premises had been previously mortgaged by the dedicator. *McClung* v. *Missouri Trust Co.*, 137 Mo. 106 (38 S. W. Rep. 578).

Sec. 161. As to what constitutes—Particular cases. A proposition by a land owner to a city, to change the location of a street, which is accepted and kept open by the latter, constitutes a dedication of the ground occupied by the street as re-located. *Swetman* v. *City of Deadwood*, 9 S. Dak. 380 (69 N. W. Rep. 582). Where the owner of a tract of land to the edge of which L street extended, by his conveyance of parcels thereof, left a strip the width of the street properly located for its extension and in one of the deeds referred to a boundary line as intersecting "the east side of what will be L street when the same shall be extended," it was held that such acts constituted a dedication of the strip as an extension of the street. *Kentucky Refining Co.* v. *Selvage*, Ky. (41 S. W. Rep. 288). Cal. Stat. 1867–68, p. 379; Stat. 1869–70, p. 586, construed and applied—dedication of land by city of San Francisco as a Home of Inebriates—transfer of title to private corporations. *Home for Care of the Inebriate* v. *City and Co. of San Francisco*, 119 Cal. 534 (51 Pac. Rep. 950).

Sec. 162. As to what constitutes—Maps and plats. Where the owner of a tract of land makes a town plat of it, with spaces on it that appear to form no part of any of the platted lots but indicate streets or avenues and the lots are sold with reference to the plat, the presumption is that such spaces are dedicated to the public as streets or avenues; and purchasers have a right to rely upon such presumption unless there is something in the plat to remove it. *Porter* v. *Carpenter*, 39 Fla. 14 (21 So. Rep. 788). Citing *Meier* v. *Railway Co.*, 16 Or. 500 (19 Pac. Rep. 610; 1 L. R. A. 856);

Shea v. *City of Ottumwa*, 67 Ia. 89 (24 N. W. Rep. 582); *City of Denver* v. *Clements*, 8 Colo. 472; *Hanson* v. *Eastman* 21 Minn. 509; *City of Indianapolis* v. *Kingsbury*, 101 Ind. 200 (51 Am. Rep. 749). Where a vendor represents to his vendee that certain strips adjoining the land conveyed, which he has designated by stakes are for streets, the vendee takes the right to use such strips as streets, though his deed described the land conveyed by metes and bounds and made no reference to streets. *Prescott* v. *Edwards*, 117 Cal. 298 (49 Pac. Rep. 178; 59 Am. St. Rep. 186). A conveyance of land in reference to a plat may establish a dedicatian of a street marked thereon as to all persons who obtained title to lots sold according to such plat although the record of the plat is a nullity. *Town of Woodruff Place* v. *Raschig*, 147 Ind. 517 (46 N. E. Rep. 990). The fact that a plat of a town fails to clearly distinguish a triangular lot, large enough for the erection of a building, lying at the intersection of streets, does not establish a dedication of such lot to the public in the absence of other evidence showing an intention on the part of the owner to dedicate the ground to a public purpose and an acceptance of it by the public. *Steinaur* v. *City of Tell City*, 146 Ind. 490 (45 N. E. Rep. 1056). Where, before the acceptance of a dedication by plat of a street extending to an adjacent river, the several owners of the land affected joined in partition deeds, in which a ferry owned and operated by them from the end of the street is excepted and reserved, the right of the public in the street terminates at the water's edge. Bartlett, J., dissenting. *Mark* v. *Village of West Troy*, 151 N. Y. 453 (45 N. E. Rep. 842).

Sec. 163. Dedication of public squares or parks—Rights of abutting owners. Where a land company platted lands for a town and designated on the plat a large tract as "Avondale Park," which it claimed exempt from taxation and improved for park purposes, with reference to which it sold lots representing the park tract as a public park and charging more for lots fronting thereon, it is held that such acts constitute an irrevocable dedication to the public use. *Avondale Land Co.* v. *Town of Avondale*, 111 Ala. 523 (21 So. Rep. 818). A public square in a town or village, which

for more than eighty years has been treated as such by the county court of the county, has been recognized as such by the municipal authorities of the town, and used as a public square by the court and the public generally, must be considered as dedicated as a public square for the use of the public. *Sturmer* v. *County Court*, 42 W. Va. 724 (26 S. E. Rep. 532; 36 L. R. A. 800). Construing Neb. Comp. Stat., ch. 14, § 106, which provides that a plat duly acknowledged and recorded is equivalent to a deed in fee simple of such portion of the premises platted, as is on such plat set apart for streets and other public uses, it is held that a plat, properly acknowledged and recorded, showing the subdivision of land into blocks and lots, with streets traversing the same, with a block in the center thereof not subdivided into lots, and with no alley traversing the same, as was the case with other blocks, said block being designated "Ehmen's Park" (Ehman being the owner of the land subdivided), operated as a statutory dedication of that block for a public park; and the frequent use of the donors's name to designate the park, does not imply a reservation of the land for his private use. *Ehmen* v. *Village of Gothenburg*, 50 Neb. 715 (70 N. W. Rep. 237). Where plats of land in the city of Chicago designated certain portions as "Open ground. No buildings." "Public ground. Forever to remain vacant of buildings;" all of which land the city declared by resolution should be enclosed as a public park, which was designated by successive ordinances as "Lake Park," it is held that such acts amounted to a dedication for public use and created a restriction against the erection of buildings upon the land so designated, which restrictions were not destroyed by the temporary submergence by water of portions of the land, and they extend to adjacent land subsequently acquired by the city by filling in the shoal waters of the lake adjacent to them. Owners of abutting lots may maintain an injunction to prevent a violation of the restriction against the erection of buildings, and their right to do so is not barred by the fact that they have consented to the erection of some buildings, or by the change of the use of buildings abutting thereon, from residence to business purposes. *City of Chicago* v. *Ward*, 169 Ill. 392 (48 N. E. Rep. 927; 61 Am. St. Rep. 185; 38 L. R. A. 849).

Sec. 164. Acceptance of dedication—Necessity—What constitutes. An acceptance by the public is necessary to the completion of a dedication. *Steinaur* v. *City of Tell City*, 146 Ind. 490 (45 N. E. Rep. 1056); *Brown* v. *Taber*, 108 Ia. 1 (72 N. W. Rep. 416); *Sarver* v. *Chicago, B. & Q. R. Co.*, 104 Ia. 59 (73 N. W. Rep. 498). Until the city has accepted the dedication of streets and alleys, it has no rights in respect to them. *Jordan* v. *City of Chenoa*, 166 Ill. 580 (47 N. E. Rep. 191); *Village of Crete* v. *Hewes*, 168 Ill. 330 (48 N. E. Rep. 86). In North Carolina it is held that a private citizen cannot dedicate a public highway on his own motion without the sanction of the authorities. *State* v. *Gross*, 119 N. C. 868 (26 S. E. Rep. 91).

A town's acceptance of the dedication of land for an alley may be shown by its draining and otherwise improving it as a highway. *Fairbury Union Ag. Board* v. *Holly*, 169 Ill. 9 (48 N. E. Rep. 149). The city taking control of part of the alleys and streets designated on a recorded plat does not amount to an acceptance of others. *Jordan* v. *City of Chenoa*, 166 Ill. 580 (47 N. E. Rep. 191). The acceptance by a municipality need not be evidenced in any formal way, yet if the act relied upon as constituting the acceptance is a legislative act, it is insufficient if it is *ultra vires*, or lacks the necessary legislative formality. *Thompson* v. *Ocean City R. Co.*, N. J. Eq. (37 Atl. Rep. 129). Dedication of a highway upon country land, which is never accepted by the county in which it is located is not accepted by a city, to which such land is subseqently annexed, merely extending its jurisdiction over such such street. *City of Baltimore* v. *Broumel*, 86 Md. 158 (37 Atl. Rep. 648). Iowa Code 1878, § 527, providing that an acceptance of a dedicated street by a city can only be made "by an ordinance especially passed for such purpose," applies to cities only; and the statute only refers to the streets and alleys which are dedicated to the public use by the land owner, and not to streets and alleys, the title to which has been acquired by a city by purchase or by prescription. *Burlington, C. R. & N. Ry. Co.* v. *City of Columbus Junction*, 104 Ia. 110 (73 N. W. Rep. 501).

Sec. 165. Revocation or abandonment of dedication. Where an offer to dedicate land for a street is not accepted and it has not been used by the public for such purpose, the landowner may revoke the dedication. *Prescott* v. *Edwards*, 117 Cal. 298 (49 Pac. Rep. 178; 59 Am. St. Rep. 186); *Brown* v. *Taber*, 103 Ia. 1 (72 N. W. Rep. 416), applying Ia. Code 1873, § 564. A dedication of land for a public square by the making of a plat and selling lots in reference thereto, cannot be revoked except by the joint action of all the parties interested. *Moore* v. *Kleppish*, 104 Ia. 319 (73 N. W. Rep. 330). The dedication of land to be implied from a reference to it as a street in conveyance of adjacent land, is revoked by the subsequent conveyance of the land intended for a street to the same grantee before an acceptance of the dedication. *Clendening* v. *Maryland Const. Co.*, 86 Md. 80 (37 Atl. Rep. 709). A dedication of land for use as a street by conveyances of adjacent land which refer to the street as such, is unaffected by a delay in opening the street, *Flersheim* v. *City of Baltimore*, 83 Md. 489 (36 Atl. Rep. 1098); but purchasers of platted lands entitled to insist upon the dedication of certain portions of the plat to use as streets and public grounds may bar their claim by acquiescing in the private occupancy and improvement of such portions by others for more than 20 years. *Mason* v. *City of Chicago*, 163 Ill. 351 (45 N. E. Rep. 567).

Sec. 166. Miscellaneous notes. A statute (How. Ann. Mich. Stat., § 3323) authorizing a railroad company corporation to acquire lands by grant or by condemnation, does not authorize it to acquire lands by dedication. *Minneapolis, St. P. & S. Ste M. Ry. Co.* v. *Marble*, 112 Mich. 4 (70 N. W. Rep. 319). See Ballards' Law Real Prop., Vol. IV, § 122. Where the fact of a removal of a fence is given in evidence to show a dedication of land to highway purposes, it is competent to show the intention of the party in removing the fence. *Pittsburg, C. C. & St. L. Ry. Co.* v. *Noftsger*, 148 Ind. 101 (47 N. E. Rep. 332). One making a dedication of a street may reserve the right to use a portion of it for railroad purposes, and persons acquiring lots adjacent to such street with knowledge of this reservation are

estopped to dispute its exercise. *Tallon* v. *City of Hoboken*, 59 N. J. L. 383 (36 Atl. Rep. 698); *Tallon* v. *City of Hoboken*, 60 N. J. L. 212 (37 Atl. Rep. 895). Grantees of land who take a conveyance of it after its dedication and acceptance as a street, from the owner who made the dedication, and with knowledge of the public use in accordance therewith, take subject to such dedication and the rights of abutting owners whose title was acquired previously. *Elliott* v. *Jenkins*, 69 Vt. 134 (37 Atl. Rep. 272).

DEEDS.

EPITOME OF CASES.

Sec. 167. As to what constitutes a conveyance—Consideration—Use of seal. Where an instrument in addition to containing all necessary provisions of a lease provides that if the person named as a lessee faithfully performs certain conditions the grantor and his wife "do hereby grant to him one day after my and my wife's death, the farm or tract of land described in this agreement his heirs and assigns forever," it is held that the instrument is a valid present grant of the lands described. *Fitz* v. *Menges*, 179 Pa. St. 122 (36 Atl. Rep. 218). Love and affection are a sufficient consideration for a deed from a husband to his wife. *Tillaux* v. *Tillaux*, 115 Cal. 668 (47 Pac. Rep. 691). Making provision for a minor child is a meritorious consideration for a deed. *Hutsell* v. *Crewse*, 138 Mo. 1 (39 S. W. Rep. 449). Particular evidence held sufficient to establish an agreement on the part of a son to support his father in consideration of a conveyance by the latter to him. *Walker* v. *Walker*, 104 Ia. 505 (73 N. W. Rep. 1073). Where there are several signers there need not be a separate seal for each as several may adopt one seal. *Warder, Bushnell & Glessner Co.* v. *Stewart*, 2 Marvel (Del.) 275 (36 Atl. Rep. 88).

Sec. 168. Grantor and grantee—Designation and name—Grantee's knowledge of execution of deed. When

a middle initial is added to a name or omitted from it in a conveyance so as to raise a doubt that the maker of a deed is the owner of the land, a further description of the maker in the deed as the heir of a certain other person deceased, and a statement in the notary's certificate of acknowledgment that she is known to him to be the same person described in, and who executed the deed, will remove such doubt, and establish *prima facie* the identity of the maker. *Blomberg* v. *Montgomery*, 69 Minn. 149 (72 N. W. Rep. 56). In Alabama it is held to be well settled "that when a deed of conveyance is subscribed by more names than one, and some of the subscribers' names are not shown in the body or granting clause, while others are there shown, such instrument is not the deed, and does not convey the interest, of those whose names are omitted from the granting clause, and shown only in the signatures, when there is nothing in the deed to indicate an intention on their part to become grantors." *Johnson* v. *Goff*, 116 Ala. 648 (22 So. Rep. 995). A deed made to an intended grantee, by the wrong name, is not void and his identity may be established by parol. *Salmer* v. *Lathrop*, 10 S. Dak. 216 (72 N. W. Rep. 570). Where a grantee named in a deed subsequently conveys in due form the land described, it is immaterial that the deed was executed without his knowledge, and was not actually delivered to him, but was delivered to the party who actually purchased the land and procured the execution of the deed in which he was named as grantee. He acquiesces and assents to the transaction by his subsequent conveyance. Nor is the validity of the deed to him affected by the fact that the grantor had no knowledge, when executing and delivering the same, that the real purchaser was not named as grantee therein. *Crowley* v. *C. N. Nelson Lum. Co.*, 66 Minn. 400 (69 N. W. Rep. 821).

Sec. 169. Filling blanks. A blank in a deed, left for the grantee's name, may be filled by an agent under authority given by parol by the maker of such deed. *Lafferty* v. *Lafferty*, 42 W. Va. 783 (26 S. E. Rep. 262). Citing, *Speake* v. *U. S.*, 9 Cranch 28; *Drury* v. *Foster*, 2 Wall. 24; *Allen* v. *Withrow*, 110 U. S. 119, 128 (3 Sup. Ct. Rep. 517); *Cribben* v. *Deal*, 21 Or. 211 (27 Pac. Rep. 1046; 28 Am. St.

Rep. 746). Filling a blank in a deed to trustees for the benefit of creditors with the name of the attorney who is employed to defend the conveyance and his charge for services, after the execution of the deed, will not invalidate it when done with the consent of the parties. *Martin* v. *Buffaloe*, 121 N. C. 84 (27 S. E. Rep. 995).

Sec. 170. Effect of failure to affix revenue stamp. The failure to affix a revenue stamp to a deed as required by Act of Congress, July 18, 1866, does not of itself render the deed invalid or inadmissible in evidence. *Trowbridge* v. *Addoms*, 28 Colo. 518 (48 Pac. Rep. 535). The court say: "The first ground of the objection, based upon the fact that there was no revenue stamp affixed to the deed, was not well taken. Assuming that the mere notations in the margin of the records was sufficient to show the want of such stamp, nevertheless the deed was not invalidated thereby, nor rendered inadmissible in evidence. To render the deed void as a conveyance, under the terms of the United States statute of 1866 relating to stamps upon written instruments, it was incumbent upon the party questioning its validity to show that the stamp had been omitted with intent to evade the provisions of the act. In the case of *Green* v. *Holway*, 101 Mass. 243 (3 Am. Rep. 339), the court had under consideration the provisions of this act, and after noticing the prior acts upon the subject, and the changes and modifications thereof that had been made by the latter statute, held that it was not the intent or purpose of that act to render unstamped deeds and instruments which passed title absolutely void, and said: 'The only reasonable construction of all these provisions, taken together, is that an instrument not duly stamped at first is not by reason thereof absolutely void, but only voidable by proof that the stamp was omitted with intent to defraud the revenue.' *Patterson* v. *Gile*, 1 Colo. 200. In the case of *Carpenter* v. *Snelling*, 97 Mass. 452, it was held that § 168, which enacted that no deed, instrument, etc., required by law to be stamped, should be recorded or admitted in evidence without being duly stamped, applied only to courts of the United States, and could not be construed to extend to or bind the state courts. To the same effect are

Griffin v. *Ranney*, 35 Conn. 239; *Craig* v. *Dimock*, 47 Ill., 308; *Bunker* v. *Green*, 48 Ill. 243; *Express Co.* v. *Haines*, 48 Ill. 248. In *Patterson* v. *Gile*, 1 Colo. 200, it was held that § 168 was controlling upon the courts of the then territory. The court say: 'As a territory, we derive our political existence, and every political right and privilege that we enjoy, from the general government, and therefore we cannot deny the power of that government to legislate upon this subject in this way, as did the supreme courts of Illinois and Massachusetts. * * * We recognize the power of the congress to enact this law, and, according to the 168d section of this act, we will require every instrument to be stamped according to the provisions of the act.' The reason assigned for the conclusion reached in that case has ceased to exist, and we feel at liberty, under present conditions, to follow the rule sanctioned by the weight of authority. Our conclusion is that the absence of a revenue stamp from the deed did not. *ipso facto*, render it invalid or inadmissible in evidence."

Sec. 171. Delivery and acceptance of deeds—General principles. A deed does not take effect until delivered. *Fair Haven Marble and M. S. Co.* v. *Owens*, 69 Vt. 246 (37 Atl. Rep. 749). To constitute delivery of a deed, it must have passed beyond the dominion and control of the grantor, with the intention on his part and on the part of the person to whom it is delivered, that it shall presently become operative, and effectual. *Walter* v. *Way*, 170 Ill. 96 (48 N. E. Rep. 421). The presumption that a deed is delivered at its date, created by Cal. Civ. Code, § 1055, is not rebutted by proof that the consideration was not paid. *Gerke* v. *Cameron*, Cal. (50 Pac. Rep. 484). Acceptance by the grantee is necessary to complete a delivery. *Brown* v. *Brown*, 167 Ill. 631 (47 N. E. Rep. 1046). The acceptance, by their father, of a deed to minors, is sufficient, the conveyance being beneficial to them. *Rhea* v. *Bagley*, 63 Ark. 374 (38 S. W. Rep. 1089; 36 L. R. A. 86).

Sec. 172. Delivery of deeds—Particular cases. Particular evidence held sufficient to show the delivery of a deed. *Harshbarger* v. *Carroll*, 168 Ill. 636 (45 N. E. Rep. 565);

Rodemeier v. *Brown*, 169 Ill. 847 (48 N. E. Rep. 468; 61 Am. St. Rep. 176). Particular evidence held insufficient to show delivery of a deed. *Thornton* v. *Lawther*, 169 Ill. 228 (48 N. E. Rep. 412). Where a father places a son in possession of land which he has conveyed to him by a deed, and the son retains such possession for several years, cultivating the land, paying taxes thereon, and paying the father an annual sum in accordance with the terms of the deed, the heirs of such grantor will be estopped to deny the delivery of the deed, because the grantee never actually had possession of it until after his father's death. *Rodemeier* v. *Brown*, 169 Ill. 847 (48 N. E. Rep. 468; 61 Am. St. Rep. 176).

Sec. 173. Delivery by recording—Presumption from grantee's possession of deed. Where there is no evidence to the contrary, the recording of a deed is sufficient to establish the fact of its delivery, *Davis* v. *Pacific Imp. Co.*, 118 Cal. 45 (50 Pac. Rep. 7); but recording is only *prima facie* evidence of delivery. *Fair Haven Marble & M. S. Co.* v. *Owens*, 69 Vt. 246 (37 Atl. Rep. 749); *Babbitt* v. *Bennett*, 68 Minn. 260 (71 N. W. Rep. 22). A recording procured without the consent or authority of the grantor, does not constitute a delivery. *O'Connor* v. *O'Connor*, 100 Ia. 476 (69 N. W. Rep. 676). Recording a deed by a grantor does not operate as a delivery to the grantee so as to pass title at that time, where the grantor retains control and possession of both the deed and the land conveyed and it is evident from all the circumstances that neither party to it regarded the deed as delivered. *Brown* v. *Brown*, 167 Ill. 631 (47 N. E. Rep. 1046). It is held that where a grantor in a duly executed deed of gift to his natural children, delivered the deed to a deputy clerk of the proper county with instructions to have the same proved by the subscribing witness before the clerk of said court, who at the time was absent from his office, and to have the same duly registered, that the delivery was complete and could not be defeated by the grantor subsequently changing his mind and recalling the deed, which was destroyed after his death by his executor, although the grantees knew nothing of the deed or of its recall. *Robbins* v. *Rascoe*, 120 N. C. 79 (26 S. E. Rep. 807; 58 Am. St. Rep. 774; 38 L. R. A. 288).

Particular cases in which the recording of a deed was held to constitute a delivery. *Babbitt* v. *Bennett*, 68 Minn. 260 (71 N. W. Rep. 22). Possession of a duly executed and acknowledged deed by a grantee is presumptive evidence of its delivery *Snodgrass* v. *Knight*, 43 W. Va. 294 (27 S. E. Rep. 233). The possession of a deed duly executed and acknowledged is *prima facie* evidence of its delivery, and one who seeks to rebut this presumption has the burden of proof. *Ward* v. *Ward*, 43 W. Va. 1 (26 S. E. Rep. 542).

Sec. 174. Delivery to third persons. Delivery to a husband for his wife, of a deed executed to her, is sufficient delivery. *Pool* v. *Phillipps*, 167 Ill. 482 (47 N. E. Rep. 758.) The delivery of a mortgage to an attorney of the mortgagee who procured its execution, is a good delivery. *Jones* v. *Howard*, 99 Ga. 451 (27 S. E. Rep. 765; 59 Am. St. Rep. 231). Where a father, after executing a deed of land to his daughter, delivered it to the officer taking the acknowledgment with instructions to hold it until it was called for by the proper person, of all of which facts she had knowledge, and she afterwards took possession of the land conveyed, in the life time of her father, it is held that there was sufficient delivery to vest title in her, which was not affected by a subsequent loss of the deed. *Appleman* v. *Appleman*, 140 Mo. 309 (41 S. W. Rep. 794; 62 Am. St. Rep. 732). Where a deed is delivered to a third person to be retained until the death of the grantor, and then to be delivered to the grantee, a delivery made by such person to the grantee after the grantor's death is a good delivery. *Stout* v. *Rayl*, 146 Ind. 379 (45 N. E. Rep. 515); *Shea* v. *Murphy*, 164 Ill. 614 (45 N. E. Rep. 1021; 56 Am. St. Rep. 215). See Ballard's Law Real Prop. Vol. V, § 142. There is no delivery in cases of this character unless the third party takes possession of the deed. *Walter* v. *Way*, 170 Ill. 96 (48 N. E. Rep. 421). But he need not actually have the deed in his hands where his possession and control of it are complete and are so recognized by the parties. *Rodemeier* v. *Brown*, 169 Ill. 347 (48 N. E. Rep. 468; 61 Am. St. Rep. 176).

Sec. 175. Delivery in escrow. The execution of a deed by a grantor and its delivery to another to be delivered

to the grantee upon his payment of a certain sum of money, does not make the holder of the escrow the agent of the grantee, and where the condition is not performed the title remains in the grantor. *Hance* v. *Swackhamer*, N. J. Eq. (36 Atl. Rep. 494). Where a purchase money note and a deed for land are placed in escrow, the latter to be delivered when the note is paid, the holder of the note or his assignee may waive the condition and allow the deed to be delivered. *Smith* v. *Goodrich*, 167 Ill. 46 (47 N. E. Rep. 316). Where a delivery is made upon condition that the deed is to be effective when the title is approved by the grantee's attorney, such condition is for the benefit of the grantee and is waived by his recording the deed. *Hendricks* v. *Edmiston*, 15 Wash. 687 (47 Pac. Rep. 29). Where one holding a deed in escrow delivers it to the grantee before his performance of the conditions entitling him to receive the deed, one taking a mortgage from him in good faith will be protected against his grantor's title. *Shurtz* v. *Colvin*, 55 O. St. 274 (45 N. E. Rep. 527). When the condition on which an original delivery made in the life time of a party transpires, the conditional delivery becomes absolute, and the absolute delivery takes effect against the contracting parties from the date of the delivery of the contracts as escrows, notwithstanding the death of one of the contractors before the happening of the condition. *Davis* v. *Clark*, 58 Kan. 100 (48 Pac. Rep. 563). Citing, *Bostwick* v. *McEvoy*, 62 Cal. 499.

Sec. 176. Surrender and cancellation of deeds. Although title once passed by a delivered deed can not be divested by its destruction, it is held that changes in the manner of vesting the title may be made by substituted conveyances from the grantor without any previous reconveyance to him. *Coleman* v. *Reynolds*, 181 Pa. St. 317 (37 Atl. Rep. 543). In the recent case of *Slaughter* v. *Bernards*, 97 Wis. 184 (72 N. W. Rep. 977), the supreme court of Wisconsin say: "In some jurisdictions the surrender and cancellation of an unrecorded deed, with intent to revest the title in the vendor, is given that effect by applying the doctrine of estoppel. *Mussey* v. *Holt*, 24 N. H. 248 (55 Am. Dec. 234); *Farrar*

v. *Farrar*, 4 N. H. 191 (17 Am. Dec. 410). But the rule is the other way in this state, *Parker* v. *Kane*, 4 Wis. 1 (65 Am. Dec. 283); *Albright* v. *Albright*, 70 Wis. 528 (36 N. W. Rep. 254); *Rogers* v. *Rogers*, 53 Wis. 36 (10 N. W. Rep. 2; 40 Am. Rep. 756); which are in accord with the great weight of authority in this country and England. *Walker* v. *Renfro*, 26 Tex. 142; *Bailey's Adm'rs* v. *Campbell*, 82 Ala. 342 (2 So. Rep 646); *Jeffers* v. *Philo*, 35 O. St. 173; *Killey* v. *Wilson*, 33 Cal. 690; *Somers* v. *Pumphrey*, 24 Ind. 240; *Potter* v. *Adams*, 125 Mo. 118 (28 S. W. Rep. 490); 46 Am. St. Rep. 478); *Hyne* v. *Osborn*, 62 Mich. 285 (28 N. W. Rep. 821); *Roe* v. *Archbishop of York*, 6 East 86. In *Cranmer* v. *Porter*, 41 Cal. 462, the law governing the subject is stated thus: 'It is a familiar rule of law that the destruction or cancellation of a deed, after delivery, even though it be done with the consent of all the parties to it, and for the express purpose of restoring the title to the grantor, cannot work that result.'"

Sec. 177. Construction of deeds. Where a deed purports to convey the fee to the land described, it will not be held to convey a less estate on account of recitals in the certificate of acknowledgment. *Garrett* v. *Weinberg*, 48 S. C. 28 (26 S. E. Rep. 3). Where several deeds are executed at the same time, relate to the same subject matter, and are a part of the same transaction, they must be construed together. *Leach* v. *Rains*, 149 Ind. 152 (48 N. E. Rep. 858). A deed of "a parcel of land for the purposes of a road" conveys only an easement. *Wason* v. *Pilz*, 31 Or. 9 (48 Pac. Rep. 701). Citing, *Robinson* v. *Railroad Co.*, 59 Vt. 426 (10 Atl. Rep. 522). While it is a general rule that the construction of a written instrument is a question of law for the court, yet where its interpretation depends upon the sense in which the words were used, or depends upon facts *aliunde*, in connection with the written language, to ascertain the intent of the parties, the question becomes a mixed question of law and fact. *Trustees of Town of Easthampton* v. *Vail*, 151 N. Y. 468 (45 N. E. Rep. 1030). A conditional limitation in a conveyance of a fee simple estate, to the effect that if the grantee shall die without issue or their descendants living at the time

of his death and without having disposed of the land by deed or will, the title shall pass to others, is valid and the execution by the grantee of a deed of trust is not a disposition of the land within the meaning of the conveyance, where no sale has been made thereunder before the death of the grantee. *Lockridge* v. *McCommon*, 90 Tex. 284 (38 S. W. Rep. 33).

Sec. 178. Construction of particular deeds. Where, in a deed, the vendor declared that he sells the property with full warranty without a word of reservation, exception or limitation, a clause at the very close of the deed which declares: "In trust that said premises shall be used and kept, maintained and disposed of as a place of divine worship, for the use of the ministry and membership of the Colored Episcopal Church in America, subject to the discipline, usage and ministerial appointments of said church, or from time to time authorized and declared by the general conference of said church and the annual conference within whose bounds the said premises are situated," is no part of the contract between the vendor and his vendee; it is an enuciation foreign to the disposal of the property, in which the vendor who has parted absolutely with his entire interest had no concern. It is merly a clause declaratory of the object for which the purchase was made. *Board of Trustees of Seventh St. Col. M. E. Church* v. *Campbell*, 48 La. 1543 (21 So. Rep. 184). Where a grantor in contemplation of marriage to a certain woman executed a deed of trust in which he directed the trustee to make certain conveyances to the beneficiary at the grantor's death if he "should die unmarried to such woman," or if she survived him, it is held that the condition as to his dying "unmarried," did not mean that he should not marry such woman, but meant only that she should not be his wife at the time of his death. *Muller* v. *Balke*, 167 Ill. 150 (47 N. E. Rep. 355). To the same effect is the case of *Peters* v. *Balke*, 170 Ill. 304 (48 N. E. Rep. 1012). A warranty deed executed by a father to his daughter is not void because it stipulates that it is "only to take effect at the death of the grantor," but it will be construed to convey to the grantee the fee subject to a life estate in the grantor. *Harshbarger* v. *Carroll*, 168 Ill. 636 (45 N. E. Rep. 565). Where the granting clause of a deed of real estate to "L. wife

of E.," contained no words of inheritance but was followed by a *habendum* clause reading, " to have and to hold the said lots to the said L., to the children of her body begotten by the said E., to her heirs. executors, and to the assigns of the said L. and E., forever," it is held that the deed conveyed to L. a life estate with an estate in fee in expectancy to her or her heirs or to the assigns of herself and E., subject to a contingent life estate in her children begotten by E. *Downing* v. *Birney*, 112 Mich. 474 (70 N. W. Rep. 1006). A conveyance of a meeting house, by an academy to a religious corporation, on condition that the grantor may use it for " public exhibitions and other purposes," does not authorize its use of such property for daily morning prayers by its students. *Trustees of Philips Exeter Academy* v. *New Parish in Exeter*, N. J. Eq. (36 Atl. Rep. 548). Construing the Colonial Ordinance of 1641-47, which declars that " in all creeks, coves and other places about and upon the salt water where the sea ebbs and flows, the proprietor of the land adjoining shall have propriety to low water mark," it is held that the conveyance of uplands are commonly expected to convey the adjoining flats. But the proprietor of the upland and adjoining flats or shore has " the propriety " of both, and hence may convey the whole or any part of his " propriety." He may convey the uplands alone and retain the flats, or convey the flats alone and retain the uplands. In an instrument of conveyance of land bordering upon tide water, a description of the boundary lines as running " to the shore " and " thence by the shore and upland to the first bound," operates to sever the shore from the upland, and to exclude it from the conveyance. *Freeman* v. *Leighton*, 90 Me. 541 (38 Atl. Rep. 542). Particular instrument construed and held to constitute a deed and not a mortgage. *Knowles* v. *Williams*, 58 Kan. 221 (48 Pac. Rep. 856). For construction of particular deed as to power of sale, see *Adams* v. *Mauermaun*, 90 Tex. 438 (39 S. W. Rep. 280). For constructian of particular deed conveying a mine and a mill site, see *Idaho Gold-Min. Co*, v. *Union Min. & Milling Co.*, Ida. (47 Pac. Rep. 95). For construction of particular conveyance as to whether it conveyed the island referred to by Act of Congress, Sep. 27, 1850 (9 Stat. 496), see *Lovejoy* v. *Willamette Falls Elec. Co.*, 31 Or. 181 (51 Pac. Rep. 197).

Sec. 179. Recitals in deeds. A recital that the grantor is a widow is presumptively true, although it appears that she was previously married. *Harman* v. *Stearns*, 95 Va. 58 (27 S. E. Rep. 601). Recitals in a deed referring to another deed which creates an outstanding title in another, charges the grantee with notice of such title. *Simms* v. *Freiherr*, 100 Ga. 607 (28 S. E. Rep. 288).

Sec. 180. Restraints upon alienation. A condition in a deed conveying an estate in fee simple, prohibiting any alienation by the grantee for a specified time, is void. *Latimer* v. *Waddell*, 119 N. C. 370 (26 S. E. Rep. 122). See opinion for review of authorities. In the recent case of *Zillmer* v. *Landguth*, 94 Wis. 607 (69 N. W. Rep. 568), the supreme court of Wisconsin say: "It now seems well settled that, when a conveyance or devise is made in fee, a condition attempted to be annexed thereto to the effect that the purchaser or devisee shall not for any period of time convey or alien the estate is void for repugnancy. *Potter* v. *Couch*, 141 U. S. 296 (11 Sup. Ct. Rep. 1005); *Mandlebaum* v. *McDonell*, 29 Mich. 78 (18 Am. Rep. 61); *Allen* v. *Craft*, 109 Ind. 476 (9 N. E. Rep. 919); *Conger* v. *Lowe*, 124 Ind. 368 (24 N. E. Rep. 889; 9 L. R. A. 165); *Todd* v. *Sawyer*, 147 Mass. 570 (17 N. E. Rep. 527); *De Peyster* v. *Michael*, 6 N. Y. (2 Selden) 467 (57 Am. Dec. 470); *Van Horne* v. *Campbell*, 100 N. Y. 287 (3 N. E. Rep. 771); Schouler, Wills, § 602. See, upon this subject generally, *Saxton* v. *Webber*, 88 Wis. 617 (58 N. W. Rep. 905); *Van Osdell* v. *Champion*, 89 Wis. 661 (62 N. W. Rep. 539; 46 Am. St. Rep. 864; 27 L. R. A. 773)." Where a testator devised all of his property to his wife "on condition that in no case shall she give or bequeath one cent of such estate to any member of my family or to any relation of her own," it is held that the condition is against public policy and void for being in restraint of alienation. *Morse* v. *Blood*, 68 Minn. 442 (71 N. W. Rep. 682). The court say: "Conceding that, as a general proposition, a condition against alienation to particular classes of persons is good, still such a condition may be so vexatious as practically to prohibit all alienation for at least a limited time. Thus, in the present case there are many parcels of land. If the con-

dition is good, any purchaser from plaintiff of any parcel takes it at the peril of subsequent forfeiture by any act done by plaintiff after the purchase amounting to a breach of the condition. Thus, plaintiff might give one of her relatives or one of the testator's family a meal of victuals out of the property left her by her deceased husband, and it would forfeit the whole estate so devised to her, as well that part of it which she had conveyed away to strangers as that part which she still held. If this condition is good, it is a most effectual method of restraining all alienation of the property during the life of the plaintiff, and until such time after her death as it can be definitely ascertained that she committed no breach of the condition in her lifetime. No one would during this period of time pay a fair price for the property, and take the risk of such forfeiture of his title. There is much authority for holding that a condition wholly restraining the alienation of a fee simple title for a length of time is void. Gray, Restr. Alien. Prop. §§ 47, 54."

Sec. 181. Restrictions as to the erection of buildings. A condition in a deed that "no building other than one single dwelling-house shall be erected, placed, or maintained on said lot," is not violated by the occupancy of a dwelling-house as an institute in which to administer the gold cure to patients having the liquor, opium, tobacco and morphine habits. *Stone* v. *Pillsbury*, 167 Mass. 332 (45 N. E. Rep. 768). Where the authorities of a county having control of a public square agree with one conveying property to them for a jail site, that no public buildings shall be erected on such public square in front of said party's house, they cannot subsequently sell the square to private parties for the erection of private buildings, and the owner of property in favor of which such covenant was made may restrain the erection of private buildings thereon. *Sturmer* v. *County Court*, 42 W. Va. 724 (26 S. E. Rep. 532; 36 L. R. A. 300). A covenant establishing building restrictions which runs with the land and creates an easement in favor of adjoining premises may be contained in a mortgage. *Brown* v. *O'Brien*, 168 Mass. 484 (47 N. E. Rep. 195). Where a recorded deed contains an express provision that the building line shall be a specified

distance from the street, although inserted in the descriptive part of the deed, it is binding on purchasers from the grantee whose deeds contain no reference thereto. *Appeal of Townsend*, 68 Conn. 358 (36 Atl. Rep. 815). Particular case in which similar restrictions as to the erection of buildings in separate deeds made to the grantees of adjoining premises are held not to create reciprocal negative easements between them. *Goodwin* v. *Hamersley*, 69 Conn. 115 (36 Atl. Rep 1065).

Sec. 182. Reservations and exceptions. A reservation of a right of way in a deed can affect only the lands conveyed and not other lands of the grantee; such a reservation is void when made in favor of one not a party to the deed. *S. K. Edwards Hall Co.* v. *Dresser*, 168 Mass. 186 (46 N. E. Rep. 420). A quitclaim deed by a husband to his wife with a reservation that she is not to convey the premises in any manner without his written consent or joining in the conveyance, and if she died before he did she was to have no further interest in the land, and if he died before she did, then the title in fee simple should pass to her, is valid, and its effect is to leave the title to the survivor. *Bassett* v. *Budlong*, 77 Mich. 338 (43 N. W. Rep. 984; 18 Am. St. Rep. 404). A stipulation in a deed which conveyed a fee subject to a life estate in a grantor, "reserving the right to occupy and use the premises * * * as freely as I might do if the fee and title remained in myself with full power to mortgage said property to raise money for my own personal benefit at any time I may desire for and during my natural life," was held to reserve to the grantor power to mortgage the fee, and not merely his life estate for the purpose therein specified. *Bouton* v. *Doty*, 69 Conn. 581 (37 Atl. Rep. 1064). Where a deed conveyed a city lot, except so much thereof as was "set apart for sidewalk purposes," it is held that the exception includes only the land actually used for sidewalk purposes, although such amount is less than the amount designated on the plat of the grant. *Vincent* v. *City of Kalamazoo*, 111 Mich. 230 (69 N. W. Rep. 501).

Sec. 183. Cancellation of deeds. A deed will not be set aside on account of mere inadequacy of price. *Barry*

v. *St. Joseph's Hosp. & San. of the Sisters of Mercy*, Cal. (48 Pac. Rep. 68). A grantor in a deed is entitled to have it cancelled, as against the grantee, who has obtained possession of it without his consent. *Rice* v. *Hall*, Ky. (42 S. W. Rep. 99). A conveyance of land by parents to their daughter for a consideration approximating half its value and a further agreement to support them, will not be set aside where the evidence does not show the incapacity of the grantors or any fraud or undue influence exercised by the grantee. *Hemstreet* v. *Wheeler*, 100 Ia. 282 (69 N. W. Rep. 518). A conveyance from a mother to her son, in consideration of paying her debts and giving her support, no fraud or undue influence in its execution being shown, will not be set aside simply because it proved a bad bargain for her and the son failed to carry out his obligation in good faith. *Wheatley* v. *Wheatley*, 102 Ia. 737 (70 N. W. Rep. 689).

Sec. 184. Deed procured by fraud and undue influence—Recovery of damages by grantor's heirs in lieu of cancellation. Where, in an action by heirs for the cancellation of a deed made by their ancestor, on account of its having been procured by fraud and undue influence, they cannot have the relief prayed for because of the intervention of the rights of a bona fide purchaser, equity may award them damages to the extent they have been injured by the wrongful acts of the original fraudulent grantees. *Cole* v. *Getzinger*, 96 Wis. 559 (71 N. W. Rep. 75). The court say: "The remedy remaining to the plaintiffs is, therefore, for damages or compensation, to be adjudged in money, for that of which they have been deprived, as heirs at law of their ancestor, by fraud and undue influence practiced on such ancestor. The land was not converted by the voluntary and lawful consent of their ancestor into money, but still remained to him, in equity, in its character and quality of real estate; but the trust that otherwise would have attached to the land in his favor and in favor of the plaintiffs as his heirs at law, upon his death, was displaced by the further wrongful acts of these parties, namely, the causing of the title to become vested in a bona fide purchaser for value, so that the only relief that can be given under these circumstances is to charge them with

the value of the land, or interest therein of which they have been thus deprived, by way of compensation. It appears to be well settled that where a court of equity obtains jurisdiction for the purpose of granting some distinctive equitable relief, such as the specific performance of a contract, or the rescission or cancellation of some instrument, and it appears from the facts disclosed at the hearing, but not known to the plaintiff when he brought his suit, that the special relief prayed for has become impracticable, and the plaintiff is entitled to the only alternate relief possible,—of damages,—the court may, and generally will, instead of compelling the plaintiff to incur the double expense and trouble of an action at law, retain the cause, decide all the issues involved, and decree the payment of mere compensatory damages (1 Pom. Eq. Jur., § 237); especially since, by the Code, the distinction between courts of law and courts of equity has been abolished. *Hall* v. *Delaplaine*, 5 Wis. 206, 218, (68 Am. Dec. 57); *Tenney* v. *Bank*, 20 Wis. 161, 173; *Hopkins* v. *Gilman*, 22 Wis. 454, 458; *Combs* v. *Scott*, 76 Wis. 672 (45 N. W. Rep. 532); *Van Rensselaer* v. *Van Rensselaer*, 118 N. Y. 208 (21 N. E. Rep. 75)."

Sec. 185. Cancellation of deed on account of grantor's mental incapacity. A grantor in a deed is presumed to be sane and competent at the time of its execution. *Snodgrass* v. *Knight*, 43 W. Va. 294 (27 S. E. Rep. 233). A grantor who is mentally capacitated to understand ordinary business transactions at the time he executes a deed, and understands the motive and effect of such deed, knows what property he is conveying, and to whom it is being conveyed, is competent to make such deed. *Kelly* v. *Perrault*, Idaho (48 Pac. Rep. 45). In order for a grantor's voluntary conveyance to be cancelled on account of his mental incapacity, it must be satisfactorily shown that at the time the conveyance was executed, he was laboring under such a state of mental weakness or exaltation as to be incapable of fully understanding the nature and effect of the transaction; and his lack of power to execute a conveyance cannot he inferred from his extreme age. *Carnagie* v. *Diven*, 31 Or. 366 (49 Pac. Rep. 891). Particular evidence held sufficient to authorize the cancellation of a conveyance on account of the

grantor's mental incapacity. *Tomlinson* v. *Tomlinson*, 103 Ia. 740 (72 N. W. Rep. 664); *Davis* v. *Calvert*, Ky. (38 S. W. Rep. 884); *Thompson* v. *Thompson*, Ky. (39 S. W. Rep. 822); *Mays* v. *Prewett*, 98 Tenn. 474 (40 S. W. Rep. 488). Particular evidence held insufficient to authorize the cancellation of a deed on account of the mental incapacity of the grantor. *Harrison* v. *Otley*, 101 Ia. 652 (70 N. W. Rep. 724); *Claflin* v. *Claflin*, 102 Ia. 744 (71 N. W. Rep. 210); *Lodewick* v. *Lacroix*, 115 Mich. 590 (73 N. W. Rep. 897); *Kelly* v. *Perrault*, Idaho (48 Pac. Rep. 45).

Sec. 186. Cancellation of deed for fraud. A conveyance for an adequate consideration by one of his interest in an estate as heir procured by the grantee fraudulently representing to him that he had no interest in the estate, may be set aside for fraud. *Motherway* v. *Wall*, 168 Mass. 333 (47 N. E. Rep. 135). A complaint by a husband, to cancel for fraud a conveyance to his wife, in consideration of her agreement not to treat him in a cruel or inhuman manner, nor to desert him, but live with him as a true, dutiful and affectionate wife was held insufficient, where it simply alleged her violation of the promise, without alleging any material fact showing a fraudulent intent on her part at the time of the making of the promise. *Hodsden* v. *Hodsden*, 69 Minn. 486 (72 N. W. Rep. 562). Where a conveyance is executed in consideration of certain notes secured by a deed of trust, which are in fact worthless, being executed by a fictitious person, all of which is known to the party procuring the deed, and the grantor is fraudulently led to believe that they are worth their face value, the conveyance will be set aside for fraud. *Rice* v. *Silverston*, 170 Ill. 342 (48 N. E. Rep. 969). For particular cases in which the evidence was held sufficient to set aside a deed for fraud, see *Leonard* v. *Medford*, 85 Md. 666 (37 Atl. Rep. 365; 37 L. R. A. 449); *King* v. *Carmody*, 101 Ia. 682 (70 N. W. Rep. 784); *Lillibridge* v. *Allen*, 100 Ia. 582 (69 N. W. Rep. 1031); *Spurier* v. *McClintock*, 104 Ia. 79 (73 N. W. Rep. 599). Particular cases in which the evidence was held insufficient to set aside a deed for fraud. *Hatcher* v.

Hatcher, 189 Mo. 614 (89 S. W. Rep. 479); *Wiester* v. *Wiester*, Cal. (48 Pac. Rep. 1086).

Sec. 187. Cancellation of deed for undue influence or duress. Undue influence, to render a deed void, must be of such character as to deprive the grantor of free agency. *Shea* v. *Murphy*, 164 Ill. 614 (45 N. E. Rep. 1021; 65 Am. St. Rep. 215). In order to set aside a deed on the ground of undue influence, such influence must have existed at the time of the execution of the deed and must be a controlling influence in impelling its execution. The act of inducing one who has not sufficient mind to know what he is doing, to sign a deed, while an actual fraud, does not constitute undue influence. Undue influence is proven by showing that a person who is mentally capacitated to understand and does understand what he is doing, is impelled by artifice, force or fear, to do what he does not want to do and what he would not otherwise do but for such influence. *Kelly* v. *Perrault*, Idaho (48 Pac. Rep. 45). In an action to cancel a deed on account of undue influence, it is proper to show that the mother of the grantee exercised a strong influence over the grantor. *Riley* v. *Hall*, 119 N. C. 406 (26 S. E. Rep. 47). Particular evidence held sufficient to set aside a deed for undue influence. *Landis* v. *Smith*, 113 Mich. 407 (71 N. W. Rep. 937); *Dingman* v. *Romine*, 141 Mo. 466 (42 S. W. Rep. 1087). For particular cases in which the evidence is held insufficient to set aside a deed on account of undue influence, see *Doherty* v. *Noble*, 138 Mo. 25 (39 S. W. Rep. 458); *Claflin* v. *Claflin*, 102 Ia. 744 (71. N. W. Rep. 210); *Chambers* v. *Brady*, 100 Ia. 622 (69 N. W. Rep. 1015). Particular evidence held insufficient to authorize the cancellation of a deed on account of duress. *Hagan* v. *Waldo*, 168 Ill. 646 (48 N. E. Rep. 89). The same as to a mortgage. *Detroit Nat. Bank* v. *Blodgett*, 115 Mich. 160 (73 N. W. Rep. 120).

Sec. 188. Cancellation of conveyances between persons occupying fiduciary relations—Burden of proof. A deed direct from the husband to his wife will not be presumed to be the result of undue influence on account of the

marital relation. *Tillaux* v. *Tillaux*, 115 Cal. 668 (47 Pac. Rep. 691). In Missouri it is held that the fact that the grantees sustained the relation of son and son-in-law to the grantor, does not cast on them the burden of showing that the transaction was free from fraud or undue influence. *Hatcher* v. *Hatcher*, 139 Mo. 614 (39 S. W. Rep. 479). Particular evidence held sufficient to establish a confidential relation between the parties so as to cast the burden of proof upon one receiving the benefit of an unfair transaction with an aged person. *Stepp* v. *Frampton*, 179 Pa. St. 284 (36 Atl. Rep. 177); *Cole* v. *Getzinger*, 96 Wis. 559 (71 N. W. Rep. 75); *Dingman* v. *Romine*, 141 Mo. 466 (42 S. W. Rep. 1087). Particular evidence held insufficient to show the existence of a fiduciary relation. *Mauney* v. *Redwine*, 119 N. C. 534 (26 S. E. Rep. 52).

Sec. 189. Quitclaim deeds. A grantee in a quitclaim deed from one holding the mere legal title, takes subject to the prior equities of third parties. *Clemons* v. *Cox*, 114 Ala. 850 (21 So. Rep. 426). One who takes a quitclaim deed from one holding the record title of land through a tax deed, who at the time he executes the quitclaim deed, declares that he had no interest in the land, acquires no title as against the real owners of the property. *Hentig* v. *Pipher*, 58 Kan. 788 (51 Pac. Rep. 229). One having no notice of a prior unrecorded deed who takes a conveyance of a mortgagee's interest by quitclaim deed, may claim as a *bona fide* purchaser as against the grantee of the unrecorded deed. Mass. Pub. Stat. ch. 120, § 4, applied. *Starke* v. *Boynton*, 167 Mass. 448 (45 N. E. Rep. 764). A quitclaim deed will pass a title acquired by adverse possession, under Mass. Pub. Stat. ch. 120, § 2, providing that such a deed "shall be sufficient to convey all the estate which could lawfully be conveyed by a deed of bargain and sale." *Ex parte Connolley*, 168 Mass. 201 (46 N. E. Rep. 618). One who makes a quitclaim deed by which he does "hereby grant, bargain, and sell and quitclaim," and which does not contain any covenants or warranty of title, is not liable on the deed for defects or failure of title. *Nelson* v. *Hamilton Co.*, 102 Ia. 229 (71 N. W. Rep. 206).

FORM OF DEEDS.

[In Vol. I, §§ 57–105; Vol. II, §§ 133–147; Vol. III, §§ 181–197; Vol. IV, §§ 156–168; Vol. V, §§ 162–179, will be found a compilation of the statutory forms of deeds and acknowedgments for the several states and territories. Below we give such amendments, changes and additional constructions as have been made.]

Sec. 190. Arkansas. (See Vol. I, § 59; Vol. II, § 134; Vol. III, § 182; Vol. IV, § 156; Vol. V, § 163.) Sandels and Hill's digest, § 708, has been amended so as to read: "Second. When acknowledged or proved without this State, and within the United States or Territories or the country known as the Indian Territory, or in any of the colonies or possessions or dependencies of the United States, before any court of the United States, or of any State or Territory, or Indian Territory, or colony, possession or dependency of the United States, having a seal, or the Clerk of any such Court, or before any Notary Public, or before the Mayor of any incorporated city or town, or the chief officer of any city or town having a seal, before a commissioner appointed by the Governor of the State." Laws 1899, p. 277. Recorded conveyances acknowledgments of which are defective on account of omissions, or because of the failure of the officer to attach his seal of office, or to attach any seal, or when the term of the officer taking the acknowledgment has expired, are validtaed; but the statute does not apply to conveyances in litigation at the time of its passage. Laws 1899, p. 313. Except as to conveyances involved in litigation before the passage of the statute (May 8, 1899,) deeds acknowledged before a notary public in Indian Territory are legalized. Laws 1899, p. 277.

Sec. 191. Colorado. (See Vol. 1 § 61; Vol. III, § 184.) In this state it is held that where, at the time a deed was acknowledged in a foreign country, there was no statute providing for the proof of the execution of a deed conveying land in that territory by acknowledgment taken outside of the United States, the certificate of such acknowledgment is a nullity. *Trowbridre* v. *Addoms*, 23 Colo. 518 (48 Pac. Rep. 535).

Sec. 192. Connecticut. (See Vol. I, § 62; Vol. IV, § 158; Vol. V, § 165.) Deeds acknowledged out of the state to which certificate of acknowledgment is defective because taken before a magistrate who did not affix his official seal or certificate of his official character, or which were acknowledged within this state before the clerk of any probate court, or before any person who had at the time of such acknowledgment received a commission as a notary public, but who had not qualified, but has since said time duly qualified, are hereby declared valid and competent conveyances under the statutes. Laws 1899, p. 107.

Sec. 193. Georgia. (See Vol. I, § 66; Vol. II. § 137; Vol. III, § 186; Vol. IV, § 159.) An attorney of one of the parties who is likewise a notary public, is, in his official capacity, a competent witness to a mortgage *Jones* v. *Howard*, 99 Ga. 451 (27 S. E. Rep. 765; 59 Am. St. Rep. 231).

Sec. 194. Idaho. (See Vol. I, § 67.) A substantial and not a literal compliance with Rev. Stat. § 2960, prescribing a form for married woman's acknowledgment, is all that the law requires, *Northwestern & Pac. H. Bank* v. *Rauch*, Idaho (51 Pac. Rep. 764); a certificate must substantially conform to the provisions of the statute, and although it is prima facie evidence of the truth of its recitals, if it does not show the examination and acknowledgment as required by the statute, it will be presumed that such necessary acts were not done. *Co-operative Sav. & L. Ass'n.* v. *Green*, Idaho (51 Pac. Rep. 770). A defective certificate may be reformed where the acknowledgment was, in fact, correctly made. *Bunnell & Eno Inv. Co.*v. *Curtis*, Idaho (51 Pac. Rep. 767).

Sec. 195. Minnesota. (See Vol. I, § 78; Vol. IV, § 162; Vol. V, § 171.) The use of private seals in written contracts is abolished. Laws 1899, p. 88. Deeds executed without a seal, scroll or device as a substitute therefor are validated. Laws 1899. p. 2. A member of the legislature may take acknowledgments throughout the state, and his certificate should show his official character, the district he represents, and when his term of office expires. Laws 1899, p. 55. Acknowlegments taken by a notary public while a member of the legislature, prior to April 13, 1899, are legalized. Laws 1899, p. 194. Any person authorized to take acknowledgments who is at the same time an officer, director or stockholder of a corporation, is authorized to take acknowledgments of instruments, in which such corporation is interested. Laws 1899, p. 60. (Approved March 18, 1899.) Previous acknowledgments of this character are legalized. Laws 1899, pp. 17, 202. Deeds conferring a power of foreclosure by advertisement upon any attorney or firm of attorneys and which are acknowledged or witnessed by such attorney or a member of such firm, are legalized. Laws 1899, p. 18. Acknowledgments taken before an officer whose term had expired, are legalized, but the statute does not affect deeds in litigation at the time of its passage. Laws 1899, p. 409. Except as to instruments involved in litigation, preserving the rights of *bona fide* purchasers without notice and for valuable consideration, defective deeds duly recorded are legalized, in which any of the following defects exist, viz.: Where there is no seal affixed to the signature of any person or persons executing the same; where there is no subscribing witness; where the instrument has been acknowledged before a notary public or other officer required to keep an official seal, to whose signature his official seal has not been affixed. Laws 1899, p. 79.

Sec. 196. Missouri. (See Vol. I, § 80; Vol. III, § 192). Revised Statutes, 1889, § 2409, has been amended by striking out the words "and sealed" in the third line of said section; so that the section now reads as follows: "All deeds or other conveyances of lands, or of any estate or interest therein, shall be subscribed by the party granting the same, or by his lawful agent, and shall be acknowledged or proved and certified in the manner herein prescribed." Laws 1899, p. 114.

Rev. Stat. 1889, § 2408, has been amended so as to read as follows:

"The certificate of acknowledgment shall state the act of acknowledgment and that the person making the same was personally known to at least one judge of the court, or to the officer granting the certificate, to be the person whose name is subscribed to the instrument as a party thereto, or was proved to be such by at least two witnesses, whose names and places of residence shall be inserted in the certificate; and the following forms of acknowledgment may be used in the case of conveyances or other written instruments affecting real estate; and any acknowledgment so taken and certified shall be sufficient to satisfy all requirements of the law relating to the execution or recording of such instruments:

(Begin in all cases by a caption, specifying the state and place where the acknowledgment is taken).

1. In case of natural persons acting in their own right.

On this day of 19 before me personally appeared A B (or A B and C D) to me known to be the person (or persons) described in and who executed the foregoing instrument, and acknowledged that he (or they) executed the same as his (or their) free act and deed.

2. In the case of natural persons acting by attorney.

On this day of 19 , before me personally appeared A B, to me known to be the person who executed the foregoing instrument in behalf of C D, and acknowledged that he executed the same as the free act and deed of C D.

3. In the case of corporations or joint stock associations.

On this day of 19 , before me appeared A B, to me personally known, who, being by me duly sworn (or affirmed) did say that he is the president (or other officer or agent of the corporation or association), of (describing the corporation or association), and that the seal affixed to the foregoing instrument is the corporate seal of said corporation (or association), and that said instrument was signed and sealed in behalf of said corporation (or association) by authority of its board of directors (or trustees), and said A B acknowledged said instrument to be the free act and deed of said corporation (or association).

(In case the corporation or association has no corporate seal, omit the words 'the seal to said instrument is the corporate seal of said corporation (or association), and that,' and add at the end of the affidavit clause the words 'and that said corporation (or association) has no corporate seal.')

(In all cases add signature and title of the officer taking the acknowledgment.)

When a married woman unites with her husband in the execution of any such instrument, and acknowledges the same in one of the forms above sanctioned, she shall be described in the acknowledgment as his wife, but in all other respects her acknowledgment shall be taken and certified as if she were sole; and no separate examination of a married woman in respect to the execution of any release of dower or other instrument affecting real estate, shall be required." Laws 1899, p. 115.

Sec. 197. Montana. (See Vol. I, § 81.) "All deeds to real property heretofore executed in this State, or any State or Territory of

the United States, which shall have been signed by the grantors in due form, shall be sufficient in law to convey the legal title to the premises therein described from the grantors to the grantees, without any other execution or acknowledgment or witnesses thereto whatever; and such deeds so executed shall be received in evidence in all courts in this State, and be conclusive evidence of the title to the lands therein described against the grantors, their heirs and assigns." Laws 1899, p. 145.

Sec. 198. Nebraska. (See Vol. I, § 82; Vol. II, § 140; Vol. III, 193; Vol. V, § 172.) A conveyance is valid between the parties without being acknowledged or witnessed. *Holmes* v. *Hull*, 50 Neb. 656 (70 N. W. Rep. 241); *Prout* v. *Burke*, 51. Neb. 24 (70 N. W. Rep. 512). Acknowledgments taken by commissioners of deeds which are otherwise regular in form, but which have no certificate of the secretary of state attached as required by Comp. Stat. ch. 73, § 36 are legalized. Laws 1899, p. 281.

Sec. 199. New Jersey. (See Vol. I, § 85; Vol. IV, § 163; Vol. V, § 173.) A deed may be made in the following form or to the same effect: This deed made the day of in the year between (here insert names and residence of parties); Witnesseth; That in consideration of (here state the consideration) the said doth (or do) grant and convey unto the said all, *et cetera* (here describe the property and insert covenants or any other provisions); In witness whereof the said party of the first part ha hereunto set hand and seal the day and year first above written; Signed, sealed and delivered In the presence of . Laws 1899, p. 531.

The acknowledgment of a deed executed out of the state may be made before and certified by the chief justice of the United States, or any associate justice of the supreme court of the United States or any master in chancery of this state, or any circuit or district judge of the United States, or any judge or justice of the supreme or the superior courts, or the chancellor, of any state in the Union, or territory thereof, or district of Columbia, or any foreign commissioner of deeds for New Jersey, duly certified under the official seal of such commissioner, or before and by any mayor or other chief magistrate of any city, borough, or corporation in such state, territory, or district, duly certified under the seal of such city, borough, or corporation, of which he was or is mayor or chief magistrate, such circuit or district judge, judge or justice of such supreme or superior court, or chancellor of such state, foreign commissioner of deeds, mayor or other chief magistrate then having been or being anywhere within the circuit, district, state, territory, city, borough, or corporation, for which he was or is appointed, or before and by any judge of any court of common pleas of such state, territory or district, such judge then having been or being within the county or district in and for which he was or is such judge, duly certified that he was or is such judge under the great seal of such state or under the seal of the county court of the county or district in which it is made in and for which he was or is such judge, or before and by any officer in any such state of the Union, territory thereof, or

District of Columbia, then residing and being anywhere in such state, territory, or district, authorized at the time of such proof or acknowledgment by the laws of such state, territory, or district, to take the proofs and acknowledgments of deeds or conveyances of lands, tenements, or hereditaments, lying and being in such state, territory, or district; *provided*, in such case, the certificate of acknowlment or proof shall be accompanied by a certificate under the great seal of such state, territory or district, or under the seal of some court of record of the county in which it was or shall be made, that the officer before whom such acknowledgment or proof was or shall be made was, at the time of the taking of said proof or acknowledgment, authorized by the laws of such state, territory, or district, to take the acknowledgments and proofs of deeds or conveyances for lands, tenements, or hereditaments in such state, territory, or district, shall be as good and effectual as if such acknowledgment or proof had been made within this state before the chancellor thereof and had been certified by him. Laws 1898, p. 679.

Acknowledgments out of the United States may be "made before and certified by any master in chancery of New Jersey or any public ambassador, minister, consul, vice consul, consular agent, charge d'affairs or other representative of the United States for the time being, to or at any such foreign kingdom, state, nation or colony, or before and by any court of law of such foreign kingdom, state, nation or colony or before and by any notary public, or mayor or other chief magistrate of and then having been, or being within, any city, borough or corporation of such foreign kingdom, state, nation or colony, in which city, borough, or corporation such party or witnesses may have happened or may happen to be, certified in such cases by such court of law, notary public, mayor or chief magistrate in the manner in which such acts are usually authenticated by them, shall be as good and effectual as if such acknowledgment or proof had been made within this state before the chancellor thereof and had been certified by him." Laws 1898, p. 681.

The acknowledgment of a married woman must be made by her on a private examination, apart from her husband, and must show that she signed, sealed and delivered the deed as her voluntary act and deed, freely and without any force, threats or compulsion from her husband. Laws 1898, p. 685. Deeds or other conveyances made by virtue of a power of attorney and recorded prior to July 4, 1876, are legalized. Laws 1898, p. 671. Acknowledgments taken before any commissioner of deeds in and for this state whose term of office had expired or whose commission was void at the time the same were taken are validated. Laws 1898, p. 18. Defective acknowledgments which have been made for six years are validated as to deeds which have been recorded for at least five years. Laws 1898, p. 57. For act validating administrators' deeds see Laws 1898, p. 101; deeds of corporations, see Laws 1898, p. 355. For act "to repeal sundry acts respecting conveyances," see Laws 1898, p. 711.

Sec. 200. New Mexico. (See Vol. I, § 86.) "The signature or consent of the wife shall not be necessary or requisite in any conveyance, incumbrance or alienation of real property owned by the husband, whether such property became his before or during coverture." Laws 1899, p. 180, § 21, amending Comp. Laws (1897), § 1509.

Sec. 201. New York. (See Vol. I, § 87; Vol. III, § 194; Vol. IV, § 164.) Acknowledgments taken by ambassadors, ministers plenipotentiary, ministers extraordinary, ministers resident or charge d' affairs of the United States government taken before the 12th day of May, 1896, and certified in the form required by law, are legalized. Laws 1899, p. 1099. For amendment to ch. 547, Laws 1896, in reference to acknowledgments within the state by commissioner of deeds, justice of the peace or notary public, see Laws 1899, ch. 147.

Sec. 202. North Carolina. (See Vol. I, § 88; Vol. III, § 195.) Acknowledgments within the United States and in any foreign country may be taken by "any judge of a court of record, any clerk of a court of record, any notary public, any mayor or chief magistrate of an incorporated town or city, any ambassador, minister, consul, or commercial agent of the United States." Acknowledgments may be taken before any justice of the peace of any state or territory of the United States, but where an acknowledgment is taken out of the state by a justice of the peace his certificate "shall be accompanied by a certificate of the clerk of some court of record of the county in which such justice of the peace resides, which certificate of the clerk shall be under his hand and official seal, to the effect that such justice of the peace was at the time the certificate of such justice bears date an acting justice of the peace of such county and state or territory and that the genuine signature of such justice of the peace is set to such certificate." Laws 1899, ch. 235, § 5.

The form of certificate in such a case shall be substantially as follows:

I, A. B. (here give the name and official title of a clerk of a court of record) do hereby certify that C. D. (here give the name of the justice of the peace taking the proof, etc.), was at the time of signing the foregoing (or annexed) certificate an acting justice of the peace in and for the county of and state (or territory) of and that his signature thereto is in his own proper handwriting.

In witness whereof I hereunto set my hand and official seal, this day of , A. D. (L. S.) Signature of officer. Laws 1899, ch. 235, § 8.

Form of certificate acknowledgment of both husband and wife. Where an instrument shall be acknowledged by both husband and wife or by other grantor before the same officer, the form of acknowledgment shall be as follows:

I, (here give the name of official and his official title) do hereby certify that (here give the name of the grantors whose acknowledgment

is being taken) personally appeared before me this day and acknowledged the due execution of the foregoing (or annexed) instrument, and the said (here give name of the married woman or women), wife (or wives) of (here give name of husband or husbands), being by me privately examined, separate and apart from her said husband, touching her voluntary execution of the same, doth state that she signed the same freely and voluntarily, without fear or compulsion of her said husband or any other person, and that she doth still voluntarily assent thereto.

Witness my hand and (when an official seal is required by law) official seal, this (day of month) A. D. year. (L. S.) Signature of official. Laws 1899, ch. 235, § 8.

Where an instrument is required to be acknowledged by a husband and wife, the acknowledgment of either may be taken first, and such acknowledgments can be taken by different officers at different times and places. Laws 1899, ch. 235, § 9. The fact that the acknowledgment and privy examination of the wife was taken prior to the proof of the execution of the deed by the husband instead of thereafter as required by Code § 1256, does not render the deed void between the parties; and Acts 1893, ch. 293, validating probates having this defect, includes cases where the execution of a deed by the husband was proved by a subscribing witness, and the statute is not invalid as between the parties to a deed, because retrospective. *Barrett* v. *Barrett*, 120 N. C. 127 (26 S. E. Rep. 691; 36 L. R. A. 226). N. C. Laws 1868–69, ch. 35, legalizes the privy examination of a married woman made by the chairman of a court of pleas and quarter sessions, under Act March 2, 1867, when the court was not in session and at places other than the court house. *Spivey* v. *Rose*, 120 N. C. 163 (26 S. E. Rep. 701).

Form of certificate of married woman's acknowledgment. A certificate of a married woman's acknowledgment shall be in substance as follows:

I, (here give name of the official and his official title) do hereby certify that (here give name of the married woman who executed the instrument), wife of (here give the husband's name), personally appeared before me this day and acknowledged the due execution of the foregoing (or annexed) instrument; and the said (here give married woman's name), being by me privately examined, separate and apart from her said husband, touching her voluntary execution of the same, doth state that she signed the same freely and voluntarily, without fear or compulsion of her said husband or any other person, and that she doth still voluntarily assent thereto.

Witness my hand and (when an official seal is required by law) official seal, this (day of month) A. D. (year.) (L. S.) (Signature of official.) Laws 1899, ch. 235, § 8.

Form of certificate of acknowledgment by corporation. "If the deed or other instrument is executed by the signature of the president or presiding member or trustee and other members of the corporation and sealed with the common seal the following form of proof and certificate thereof shall be deemed sufficient:

This day of , A. D. , personally came before me (here give name and official title of the officer who signs the certificate), A. B. (here give name of subscribing witness), who being by me duly sworn says that he knows the common seal of the (here give the name of the corporation), and also acquainted with C. D., who is the president (or presiding member or trustee of said corporation) and also with E. F., and G. H., two other members of said corporation; and that he, the said A. B., saw the said C. D., president as aforesaid (or presiding member or trustee as aforesaid or other officer of said corporation) affix said seal to the foregoing (or annexed) instrument, and also saw said C. D. and E. F. and G. H. sign the said instrument, and that he, the said A. B., became a subscribing witness to the said deed in their presence.

(Signature of officer.)

If the deed or other instrument is executed by the signature of the president, presiding member or trustee of the corporation and sealed with its common seal and attested by its secretary the following form and proof of certificate thereof shall be deemed sufficent:

This day of A. D. personally came before me (here give name and official title of the officer who signs the certificate), A. B. (here give name of the attesting secretary), who being by me duly sworn says that he knows the common seal of (here give the name of the corporation) and is acquainted with C. D., who is the president of said corporation, and that he, the said A. B., is the secretary of the said corporation and saw the said president sign the foregoing (or annexed) and saw the said common seal of said corporation affixed to said instrument by said president (or that he, the said A. B., secretary as aforesaid, affixed said seal to said instrument), and that he, the said A. B., signed his name in attestation of the execution of said instrument in the presence of said president of said corporation.

(Signature of officer)."

Laws 1899, ch. 235, § 17.

When the proof or acknowledgment of any instrument is had before any official of some other state, territory or country and such official have no official seal, then the certificate of such official shall be accompanied by the certificate of a clerk of a court of record of the state, territory or country in which the official taking the proof or acknowledgment resides, of the official position and signature of such official; such certificate of the clerk shall be under his hand and official seal and shall be in substance as follows:

I, A. B. (here give name and official title of the clerk of a court of record), do hereby certify that C. D. (here give name of the official taking the proof, etc.), was at the time of signing the foregoing (or annexed,) certificate a (here give the official title of the officer taking proof, etc.). in and for the county of and state of (or other political division of the state, territory or country as the case may be), and that his signature thereto is in his own proper handwriting.

In witness whereof, I hereunto set my hand and seal of office, this day of , A. D.

(Seal of office.) (Signature of clerk.)

Laws 1899, ch. 235, § 8.

Sec. 203. North Dakota. (See Vol. IV, § 165; Vol. V, § 174.) Acknowledgments taken and certified by any township or city clerk, or auditor of any city, recorder of any town or village in the state, where the instruments have been duly recorded, are legalized; but the statute provides that it is not to affect the rights of *bona fide* purchasers. Laws 1899, p. 5. An acknowledgment cannot be taken by a party to an instrument or member of a partnership which is a party to the instrument, nor by the husband or wife of a party to an instrument. But an officer authorized to take acknowledgments may take acknowledgments of a corporation of which he is an officer, director, employee or stockholder; and previous acknowledgments of this character are legalized. Laws 1899, pp. 6, 64.

Sec. 204. Ohio. (See Vol. I, § 90; Vol. V, § 175.) Laws 1896, pp. 220–262, enacting the Torrens system of land transfers is expressly repealed by Laws 1898, p. 8.

Sec. 205. Oregon. (See Vol. I, § 92; Vol. II, § 142.) "All deeds to real property heretofore, executed in this state, or in any state or territory of the United States which shall have been signed by the grantors in due form, shall be sufficient in law to convey the legal title to the premises therein described from the grantors to the grantees, without any other execution or acknowledgment or witnesses thereto whatever." Laws 1899, pp. 63, 182.

Sec. 206. South Carolina. (See Vol. I, § 95.) "Whenever it shall appear from the attestation clause or from the other parts of any instrument in writing, that it was the intention of the party or parties thereto that said instrument should be a sealed instrument, then said instrument shall be construed to be, and shall have the effect of a sealed instrument, although no seal be actually attached thereto." Laws 1899, p. 48. Prior to Rev. Stat. 1893, § 580, the certificate of a wife's acknowledgment and of her renunciation of dower, made under §§ 1900, 1901, was fatally defective if it did not bear the seal of the officer taking the acknowledgment. *Bratton* v. *Burris*, 51 S. C. 45 (28 S. E. Rep. 13). Only a life estate is created where the deed does not contain any words of inheritance in the conveying part. The use of the word "heir" in the warranty clause in such a deed does not cause it to convey a fee. *Wilson* v. *Watkins*, 48 S. C. 341 (26 S. E. Rep. 663).

Sec. 207. Tennessee. (See Vol. I, § 87.) An acknowledgment following the statutory form except that instead of the statutory words "who acknowledged that he executed the within instrument for the purpose therein contained," used the words, "who acknowledged his signature to the annexed deed for all the purposes therein

expressed," is held sufficient. Mill & V. Tenn. Code, § 2855 (Shannon's Code, § 3717), applied. *Hughes* v. *Powers*, 99 Tenn. 480 (42 S. W. Rep. 1). Under Mill. & V. Tenn. Code, § 2859 (Shannon's Code, § 3721). an acknowledgment taken before a clerk of the county court is ineffectual without a certificate of his official character by the judge thereof. *Citizen's Bank* v. *McCarty*, 99 Tenn. 469 (42 S. W. Rep. 4). The statute does not provide that a notary or clerk in taking the acknowledgment of a married woman shall read over the instrument to her, but he shall examine her, touching her knowledge of its contents and effect, and if he is satisfied that she fully understands the same, he may take the acknowledgment and make the certificate. She is required to state that the execution of the instrument is done by her understandingly. *Ronner* v. *Welcker*, 99 Tenn. 623 (42 S. W. Rep. 439). A deed properly signed and acknowledged by a wife joining her husband in its execution, will be held sufficient to pass her homestead interest, although her name does not appear in the body of the deed. *Kelton* v. *Brown*, Tenn. (39 S. W. Rep. 541).

Sec. 208. Texas. (See Vol. I, § 98; Vol. II, § 143; Vol. III § 196; Vol. V, § 178.) The use of the word "the" where "they" should appear, or the omission of the word "it" after the word "retract" in a married woman's certificate of acknowledgment, will not vitiate the certificate. *Montgomery* v. *Hornberger*, 16 Tex. Civ. App. 28 (40 S. W. Rep. 628). An acknowledgment in the following form: "Before me, the undersigned authority, personally appeared R. and E., his wife, who are to me made known, and acknowledged that * * * signed, executed and delivered the foregoing deed for the purposes and considerations therein specified, and, the said E. being examined by me privily and apart from her said husband, and having the contents and effect of the foregoing deed fully explained to her by me, she acknowledged the same to be her act and deed, and declared that she signed, executed and delivered the same of her own free will and accord, without the fear, force or undue persuasion of her husband, and that she wishes not to retract it," was held sufficient as to the wife, although defective as to the husband. *Rork* v. *Shields*, 16 Tex. Civ. App. 640 (42 S. W. Rep. 1032).

Sec. 209. Virginia. (See Vol. I, § 101; Vol. II, § 144; Vol. III, § 197; Vol. IV, § 166.) A technical release by one out of possession is held to operate to pass title, under Code § 2439, providing that whenever in any deed there shall be used the words, "the said grantor releases to the said grantee all his claims upon the said lands," it shall be construed as a quitclaim. *Harman* v. *Stearns*, 95 Va. 58 (27 S. E. Rep. 601). Particular evidence held insufficient to show that a married woman was examined separate and apart from her husband as required by statute. *McCaskill* v. *McKinnon*, 121 N. C. 214 (28 S. E. Rep. 343).

Sec. 210. Washington. (See Vol. I, § 102; Vol. II, § 145.) A certificate of acknowledgment of a mortgage which recites that the

grantors "duly acknowledged the execution of the same," is sufficient. *Johnson* v. *Irwin*, 16 Wash. 652 (48 Pac. Rep. 345).

Sec. 211. Wyoming. (See Vol. I, § 105; Vol. IV, § 168.) Deeds executed out of the state the certificate of acknowledgment to which fails to state that the instrument was executed and acknowledged according to the law of the state where such acknowledgment was taken are validated, where the laws of Wyoming in relation to such certificate have, in all other respects, been complied with. Laws 1899, p. 10.

DEFINITIONS.

EPITOME OF CASES.

Sec. 212. What will be treated as real estate—"Unmarried" and "park" defined. Sand and gravel, while in its original bed, will be treated as real estate. *Glencoe Sand & Gravel Co.* v. *Hudson Bros. Com. Co.*, 138 Mo. 489 (40 S. W. Rep 93; 60 Am. St. Rep. 560; 36 L. R. A. 804). Under Idaho Rev. Stat. § 2825, possessory rights to ditch and water rights are real property. *Ada Co. Farmers' Irr. Co.* v. *Farmers' Canal Co.*, Idaho (51 Pac. Rep. 990; 40 L. R. A. 485). "Unmarried," defined and construed. *Muller* v. *Balke*, 170 Ill. 150 (47 E. Rep. 855); *Peters* v. *Balke*, 167 Ill. 304 (48 N. E. Rep. 1012). In discussing the definition of the term "park," the supreme court of Nebraska, in the case of *Ehmen* v. *Village of Gothenburg*, 50 Neb. 715 (70 N. W. Rep. 287), say: "In the United States we have no parks, within meaning of the forestry laws of England. The term has never, in this country, been used in that sense. Indeed, such signification is not now, in England, exclusive. To demonstrate this, we need only to refer to 'Hyde Park,' in London. The universal meaning of the term in this country is a tract of land in or near a city or town, and devoted to purposes of amusement, pleasure, or exercise. There may be private parks, but the use of the term to designate private property is the exception, and public use is implied by the term, in the absence of language or surrounding facts implying the contrary. In *Price* v. *Inhabitants*, 40 N. J. L. 608, it is

said, 'A park in a city means, to the sense of every person, a place open to every one.' In *People* v. *Green,* 52 How. Prac. 440, the term 'park' is defined as 'a piece of ground adapted and set apart for the purposes of ornament exercise and amusement'."

DESCENT.

EPITOME OF CASES.

Sec. 213. Descent of real estate—Construction of statutes. Upon the death of an ancestor intestate, the title to his real estate vests in his heirs instantly without administration of his estate. *Johnston* v. *Colby*, 52 Neb. 327 (72 N.W. Rep. 313). Construing Ia. code, §§ 2455, 2456, fixing the right of inheritance of parents of an intestate dying without issue, and § 2557, which provides that "if both parents are dead, the portion which would have fallen to their share by the above rules, shall be disposed of in the same manner as if they had outlived the intestate and died in the possession and ownership of the portion thus falling to their share," it is held that where property passes from brother to brother under the last section, the inheritance is direct and does not depend on the fact of the parents at the time of their decease being capacitated to inherit under the statute of descent. *Wilcke* v. *Wilcke*, 102 Ia. 173 (71 N. W. Rep. 201). Under Minn. Gen. Stat. 1894, § 4471, subd. 6, if the intestate leaves no issue, husband or wife, father or mother, brother or sister, but all of his next of kin are nephews or neices, they take his estate in equal shares although they are the children of different deceased brothers and sisters. In re Breg's Estate, 71 Minn. 11 (73 N. W. Rep. 511). Ohio Rev. Stat. § 4185, construed and applied—proceedings to designate one as heir. *Bird* v. *Young*, 56 O. St. 210 (46 N. E. Rep. 819).

Minn. Gen. Stat. 1894, § 4477 regulating inheritance by adopted children has been amended by adding a provision that if any adopted child inheriting property as such, "shall die during its minority unmarried and without issue" the property inherited by him "shall pass by inheritance to the heirs at law of

the person from whom said child so received said property." Minn. Laws 1899, p. 180. Mo. Rev. Stat. § 971—adoption of children—amended by adding § 971a. Laws 1899, p. 50. Mo. Rev. Stat. §§ 4799–4822, relating to "Escheats" have been repealed and a new statute covering the entire subject enacted. Laws 1899, p. 203. Wyoming also has a new statue on this subject. Laws 1899, p. 158.

Sec. 214. Descent of equitable and legal title. Where an ancestor has only an equity of redemption in land, his heir does not inherit the legal estate. *Russell* v. *Roberts*, 121 N. C. 322 (28 S. E. Rep. 406). In determining questions as to the descent of real property, regard is had to the legal title only; and where the legal title is acquired by purchase, and an equity in the property by inheritance, the legal title and equitable interest at once unite, and upon the death of the owner the descent of the property will be cast as an estate which came by purchase. *Higgins* v. *Higgins*, 57 O. St. 239 (48 N. E. Rep. 943).

Sec. 215. Inheritance from slaves. Tenn. Laws 1865–66, ch. 40, § 5 (Shannon's Code §§ 4179, 4198) provides that "all free persons of color who were living together as husband and wife in this state while in a state of slavery, are hereby declared to be man and wife, and their children legitimately entitled to an inheritance in any property heretofore acquired or that may be hereafter acquired by said parents to as full an extent as the children of white citizens are entitled by the laws of this state." Construing this statute in the case of *Shepherd* v. *Carlin*, 99 Tenn. 64 (41 S. W. Rep. 340), the supreme court say: "We are of the opinion that, by the plain terms of this act, the right and power of inheritance are conferred only as to such property as may descend from parents, and that no right of collateral inheritance is conferred by the act. This was no doubt, the intention of the general assembly, and is the clear meaning of the words of the act, which can admit of no other construction. A like construction has been placed upon statutes similar to the act of 1865–66 in other states. *Tucker* v. *Bellamy*, 98 N. C. 81 (4 S. E. Rep. 84); *Jones* v. *Hoggard*, 108

N. C. 178 (12 S. E. Rep. 906, 907); *Williams* v. *Kimball*, 35 Fla. 49 (16 So. Rep. 788–786; 48 Am. St. Rep. 238; 26 L. R. A. 746)." The same construction is given this statute in the case of *Henderson* v. *Baniel*, Tenn. (42 S. W. Rep. 470), in which it is also held that Laws 1869–70, ch. 75 (Mill & V. Code § 3287; Shannon's Code, § 4281), providing that, " In all cases of free persons of color, or slaves, owning real or personal estate, and having while slavery existed, departed this life, possessed of, or having, legal or equitable estate, the same shall descend and be distributed between the widow and their children or descendants, or next of kin, whether they were slaves or not at the death of the decedent, agreeable to the laws of descent and distribution provided for free persons," does not authorize the inheritance of the decedent's property, in such a case, by his brother's children where the brothers were born out of wedlock, under the condtions existing at the time of slavery. In Kentucky, except as against innocent purchasers or where the property has been previously " divided out or sold, or distributed by the order or judgment of any court of competent jurisdiction," children born of slave marriages are entitled to inherit prop erty of both father and mother. Laws 1898, p. 102.

Sec. 216. Descent to surviving husband. A husband may waive his right to inherit from his wife by an agreement either antenuptial or postnuptial. *Leach* v. *Rains*, 149 Ind. 152 (48 N. E. Rep. 858). A surviving husband's right under Mass. Pub. Laws, ch. 124, § 1, as amended by Stat. 1887, ch. 290, § 1, to take the real estate of his dead wife in fee to an amount not exceeding $5,000 " if she die and leave no issue living," is not dependent upon the wife having had children. *Howe* v. *Berry*, 168 Mass. 418 (47 N. E. Rep. 104). As to descent of property between husband and wife under the statutes of Louisiana, see *Zeigler* v. *His Creditors*, 49 La. 144 (21 So. Rep. 666).

Sec. 217. Descent to surviving wife—Statutes construed. Ala. Acts 1886–87, p. 112; Acts 1892–93, p. 188, construed and applied—title and rights of widow where husband leaves an estate less in value than the amount exempted

by law. *Wilkins* v. *Walker*, 115 Ala. 590 (22 So. Rep. 476). Under the statutes of Indiana the right of a widow to one-third of the real estate of her deceased husband is absolute, and she is entitled to the same free from all demands of creditors except mortgages in the execution of which she has joined. The waiver of such a right as to the real estate upon which she may have joined with her husband in executing a mortgage operates only in favor of the mortgagee, and not in favor of other creditors or liens. To protect the widow in this right she is entitled to have the personal assets not required for the payment of claims expressly preferred by statute applied to the payment of the mortgage or other liens necessary to protect her one-third of the real estate, and clear the same of incumbrances. If such assets are not sufficient to protect her said one-third interest, she is entitled to have all of the real estate of her deceased husband that did not descend to her as widow sold, and the proceeds applied to payment of liens on real estate, so as to protect the interest given her by statute. *Shobe* v. *Brinson*, 148 Ind. 285 (47 N. E. Rep. 625). Ind. Rev. Stat. 1894, § 2641, which prohibits a widow, who has remarried, holding lands by virtue of a former marriage by which there is a child or children or their descendants surviving, from alienating such lands does not render void her lease of such lands for life. *Forgy* v. *Davenport*, 146 Ind. 399 (45 N. E. Rep. 592). "If a man die intestate leaving surviving him a second or other subsequent wife without children by him, but leaving a child or children or their descendants alive, by a previous wife, such surviving, childless, second or other subsequent wife, shall take only a life estate in the lands of her deceased husband, and the fee thereof shall at the death of such husband vest at once in such child or children, or the descendants of such as may be dead, subject only to the life estate of such widow." Ind. Laws 1899, p. 131. This statute also provides that conveyances executed by the husband's children by a former wife before the death of the subsequent childless wife operate to convey title after her death; and validates conveyances between such wife and children or by them to third parties. Id. p. 132. McClain's Ia. Code, § 3644, giving a surviving wife the right to a one-third of her husband's property in fee simple, which has not been sold on

execution or any other judicial sale, does not bar her claiming such interest in land which has been sold on execution, as against a party who claims no title under the execution sale. *Sherod* v. *Ewell*, 104 Ia. 253 (73 N. W. Rep. 493). Miss. Code, 1892, § 1549, construed and applied—rights of widow as against husband's grandchildren by an illegitimate daughter. *Hope* v. *Hoover*, Miss. (21 So. Rep. 184).

Sec. 218. Widow's right of quarantine. A widow's right to remain on and enjoy the mansion house of her husband and the "messuages and plantation thereto belonging," until the assignment of her dower, does not give her even a possessory right to other lands of her husband. *Sell* v. *McAnaw*, 138 Mo. 267 (39 S. W. Rep. 779). This right is assignable. *Carey* v. *West*, 139 Mo. 146 (40 S. W. Rep. 661). Construing and applying N. J. Revision, p. 320, § 2 (Pub. Laws 1870, p. 22) which provides that "it shall be lawful for the widow to remain in and to hold and enjoy the mansion house of her husband, and the messuage or plantation thereto belonging without being liable to pay any rent for the same," until her dower be assigned, it is held that where the deceased husband occupied part of the building as a dwelling and the remainder was leased to a firm of which he was a member, his widow's right of quarantine is limited to that portion of the building which her husband used for a dwelling. She may bar her right of quarantine in lands by the execution of a lease thereof, although it is not binding on the executor and heirs of her husband who joined with her in its execution. *Davis* v. *Lowden*, 56 N. J. Eq. 126 (38 Atl. Rep. 648).

Sec. 219. Advancements. A voluntary conveyance from parent to child is presumed to be an advancement, and the burden of showing the contrary is upon the person who claims that it was not so intended. For the purpose of showing that such a deed was an advancement, parol evidence is admissible to show that it was made without any consideration. *Finch* v. *Garrett*, 102 Ia. 381 (71 N. W. Rep. 429). But where a conveyance recites a valuable and substantial consideration near the full value of the property, it will not be

presumed to be an advancement, and the burden of proving it an advancement is upon the person claiming it to be such. *Kiger* v. *Terry*, 119 N. C. 456 (26 S. E. Rep. 88). Where a father purchased land which he caused to be conveyed to his minor sons, it will be treated as a present advancement although the father retains possession and improves the property. *Rhea* v. *Bagley*, 63 Ark. 374 (38 S. W. Rep. 1039; 36 L. R. A. 86). An advancement to a child operates to satisfy a debt due the child if the advancement be in amount equal to or greater than the debt. *Brooks' Assignee* v. *Summers*, 100 Ky. 620 (38 S. W. Rep. 1047). Construing Ill. Rev, Stat. ch. 39, § 7, which provides that " no gift or grant shall be deemed to have been made in advancement unless so expressed in writing or charged in writing by the intestate as an advancement, or acknowledged in writing by the child or other descendant," it is held that a conveyance of land by a father to his sons, cannot be shown to have been made as an advancement by oral declarations and admissions of the parties to it. An advancement which is not evidenced in the manner required by statute, is in legal effect, no advancement at all, however clearly it may appear it was so intended. *Bartmess* v. *Fuller*, 170 Ill. 198 (48 N. E. Rep. 452). Under Ia. Code, § 2459, advancements are to be valued at what the property is worth at the time of the distribution. *Finch* v. *Garrett*, 102 Ia. 381 (71 N. W. Rep. 429).

Sec. 220. Rights of creditors as against heirs. One inheriting land from his father, cannot subsequently claim the right of inheritance against his father's grantee in a warranty deed without offering to make good the father's warranty out of property received from his estate. *Rhodes* v. *Rhodes*, Ky. (38 S. W. Rep. 706). The heirs are not bound to pay the debs or discharge the obligations of the ancestor unless they have received property from his estate. If they have received assets from the estate, then they are responsible to the extent of their inheritance, but beyond that they are liable neither in law nor in equity. If, then, a party seeks satisfaction for debts or obligations of the ancestor from the heirs, the burden is upon him to show that they inherited assets from the ancestor's estate. *Bacon* v. *Thornton*, 16 Utah 188 (51 Pac. Rep. 158). Citing, *Cutright* v. *Stan-*

ford, 81 Ill. 240; *Byrd* v. *Belding*, 18 Ark. 118; *Schmidtke* v. *Miller*, 71 Tex. 108 (8 S. W. Rep. 638); *Forman* v. *Stickney*, 77 Ill. 575; *Walker* v. *Deavir*, 79 Mo. 664. Where an heir owes the estate more than the value of his share in it and does not pay his debt, he has no interest in the property of the estate which can be subjected to an execution sale by his judgment creditor. Tex. Rev. Stat. 1895, art. 1688, 1694, construed and applied. *Oxsheer* v. *Nave*, 90 Tex. 568 (40 S. W. Rep. 7; 37 L. R. A. 98). Under the common law, which prevails in Texas, where a deceased vendee was personally liable for the purchase money for land, payment of which was secured by a vendor's lien, as between those who take the personal property and those taking the real estate, the personal property is liable as the primary fund to discharge debt so secured. Tex. Rev. Stat. 1895, Arts. 1689, 2112; Rev. Stat. 1879, Art. 3129, construed and applied. *Minter* v. *Burnett*, 90 Tex. 245 (38 S. W. Rep. 850). Pa. Act, Feb. 24, 1834, § 34, construed and applied—defense by heirs against claim to charge land in their possession. *Paul* v. *Grimm*, 183 Pa. St. 330 (38 Atl. Rep. 1017).

DESCRIPTION OF REAL ESTATE.

EPITOME OF CASES.

Sec. 221. Sufficiency of—General principles. A description of premises in a summons in an action for unlawful detainer is sufficient if it can be rendered certain by extrinsic evidence. *Simpkins* v. *White*, 43 W. Va. 125 (27 S. E. Rep. 361). A description, otherwise sufficient, will not be held bad because of a false statement in regard to the grantor's source of title. *Langley* v. *Honey*, 20 R. I. 698 (38 Atl. Rep. 699). Where the description in a deed or devise of real estate is impossible of ascertainment the instrument is void. If the starting point of a boundary line cannot be identified, no sufficient description may be had. *Edens* v. *Miller*, 147 Ind. 208 (46 N. E. Rep. 526). A description which furnishes means of identifying the land intended to be affected by the instrument is sufficient. *Ashland Bldg. & Sav. Ass'n* v. *Jones*,

Ky. (41 S. W. Rep. 487). A mortgage of real estate will not be invalidated by reason of an error in the description of the property, in case the remainder of the description, after rejecting the erroneous portion, is sufficiently definite to enable the land to be located. *Carpenter Paper Co.* v. *Wilcox*, 50 Neb. 659 (70 N. W. Rep. 228). The same rule applies to a description of buildings in an insurance policy. *Baker* v. *State Ins. Co.*, 31 Or. 41 (48 Pac. Rep. 699; 65 Am. St. Rep. 807). But an error in the description of property in a deed cannot be disregarded unless there is a sufficient description in the deed, not only to plainly indicate the property intended, but also to show that there is an error which can be disregarded, and the property still be clearly identified. *Heller* v. *Cohen*, 154 N. Y. 299 (48 N. E. Rep. 527). If a direction or course given in a deed is impossible or senseless it must be omitted or disregarded; and if other calls or parts of the description are sufficient to identify the land conveyed, the deed must be sustained. *Brose* v. *Boise City Ry. & Ter. Co.*, Idaho (51 Pac. Rep. 758). Where the sufficiency of a description depends upon the existence of a certain building and streets referred to by it, they will be presumed to exist until the contrary appears. *Kleiner* v. *Bowen*, 166 Ill. 537 (46 N. E. Rep. 1087). While the government authorities do not survey and subdivide lands within a Mexican grant, there is no reason why the owners of a Mexican grant cannot have the same surveyed and subdivided in the same way that it would be if it were a part of the public domain; and where such owners have adopted the government method of surveying and subdividing their land and have caused a map to be made showing such subdivisions, a description in accordance with the survey so made, although the map is not referred to, will be held sufficient as against all persons having notice of the map. *Rea* v. *Haffenden*, 116 Cal. 596 (48 Pac. Rep. 716).

Sec. 222. Sufficiency of—Particular cases. A description in a tax receipt as "west half of lot 1, N. E. (N. W. N. E.) Sec. 1, T. 6, N. R. 6," was held sufficient to identify the land as "west half of lot one, N. E. quarter Sec. 1, T. 6, N. R. 6," though each lot was in fact the S. W ¼ of

said section, the letters included in the parentheses being rejected as immaterial. *Perkins* v. *Bulkley*, 166 Ill. 229 (46 N. E. Rep. 733). A description of a water ditch in a conveyance thereof, which gives general particulars as to its head and course and designates it by its descriptive name, there being no other ditch in the same county having the same name, was held sufficient. *Murray* v. *Tulare Irrigation Co.*, 120 Cal. 311 (49 Pac. Rep. 563.) A description of land as one acre in a designated corner of a certain block is sufficient and the validity of the description is not affected by the fact that a highway runs through the acre. The description will be held to embrace an acre in the form of a square in the corner of the designated block. *Richey* v. *Sinclair*, 167 Ill. 184 (47 N. E. Rep. 364). A description in an administrator's deed and the probate proceedings upon which it is based, of the land sold as the interest of the decedent "in and to 880 acres" of a certain survey, is held not too indefinite to pass title, where it is made to appear that the decedent held the record title to a half interest in such tract, described by metes and bounds. *Hermann* v. *Likens*, 90 Tex. 448 (39 S. W. Rep. 282). For particular description held sufficient, see *Hitchcock* v. *Southern Iron & Timber Co.*, Tenn. (38 S. W. Rep. 588). A deed which does not show the state and county in which the land is situated, the meridian to which the range should be referred, nor whether the township named in the description is north or south, is insufficient to convey title. *Hartigan* v. *Hoffman*, 16 Wash. 34 (47 Pac. Rep. 217). A description of premises embraced in a lease as "commencing at the north line of H.'s claim, running thence north up to the south line of K. and A.'s claim, thence 50 yards from low tide the full length of said claim back from said low water mark," was held to be so defective as to render the lease void. *Bingham* v. *Honeyman*, 32 Or. 129 (51 Pac. Rep. 735; 52 Pac. Rep. 755). Particular description held insufficient to sustain a judgment in ejectment. *Boyer* v. *Robertson*, 149 Ind. 74 (48 N. E. Rep. 7).

Sec. 223. Construction of descriptions. In a deed where quantity is expressed in terms of feet frontage, the words "more or less" will not cover a deficiency of fifty-five

feet in a total of 156 feet. *Haynie* v. *American Trust Inv. Co.*, Tenn. (89 S. W. Rep. 860.) When a deed contains two descriptions of the land which are inconsistent with each other, that description must control which best expresses the intention of the parties as manifested by the whole instrument and the surrounding circumstances. *Beardsley* v. *Town of Nashville*, 64 Ark. 240 (41 S. W. Rep. 858). A description of land in a tax deed as block 28 "original grantee R. R' Add." is held not to authorize the grantee to recover block 28 of Railroad Addition, the original grantee of which is W. G. Eustis. *Ozee* v. *City of Henrietta*, 90 Tex. 384 (38 S. W. Rep. 768). The fact that the conveyance of a designated lot which is described by metes and bounds states that it is the lot upon which a certain building is situated, does not cause it to convey other land over which the building extends. *Baltimore Bldg. & L. Ass'n* v. *Bethel*, 120 N. C. 344 (27 S. E. Rep. 29). A particular description of premises conveyed, when such particular description is definite and certain, will control a general reference to another deed as the source of title. Nor will a clause in a deed at the end of a particular description of the premises by metes and bounds, "meaning and intending to convey the same premises conveyed to me," either enlarge or limit the grant. *Smith* v. *Sweat*, 90 Me. 528 (38 Atl. Rep. 554). A description of lots marked on a properly executed plat, by reference to them according to their designated numbers, has the same effect as a description by metes and bounds delineated on the plat and does not include lands within an abutting street which has been previously vacated by the owner before the acceptance of the plat. *Brown* v. *Taber*, 108 Ia. 1 (72 N. W. Rep. 416). A deed conveying the "west half" of a fractional lot which contains less than the legal subdivision of forty acres, conveys an equal half of the lot in area. *Owen* v. *Henderson*, 16 Wash. 89 (47 Pac. Rep. 215; 58 Am. St. Rep. 17). Where one reserved from a devise of an eighty acre tract of land upon the west side of which there was located a family burying ground of definite dimensions, "One acre of land, to be kept as a family burying ground, and to be taken in a square from out of the west side" of said eighty, "so as to comprise the present burying ground near the orchard," it is

held that, it being impossible to identify a starting point for the boundary lines, only such portion of the land as had been used for burial purposes within the acre could be claimed under the reservation. *Edens* v. *Miller*, 147 Ind. 208 (46 N. E. Rep. 526). For construction of particular descriptions, see *Steelman* v. *Atlantic City Sewerage Co.*, 60 N. J. L. 461 (38 Atl. Rep. 742); *Penrose* v. *Steelman*, N. J. Eq. (38 Atl. Rep. 807); *Hyatt* v. *Clever*, 104 Ia. 388 (73 N. W. Rep. 881); *Lord* v. *Wentworth*, N. H. (36 Atl. Rep. 17); *Cunningham* v. *Village of Willow River*, 68 Minn. 249 (71 N. W. Rep. 532); *Smith* v. *Sweat*, 90 Me. 528 (38 Atl. Rep. 554); *Cartwright* v. *Trueblood*, 90 Tex. 535 (39 S. W. Rep. 930).

Sec. 224. Evidence in aid of descriptions—Latent and patent ambiguities. A patent ambiguity cannot be removed by the application of extrinsic evidence. *Bingham* v. *Honeyman*, 32 Or. 129 (51 Pac. Rep. 735; 52 Pac. Rep. 755). Parol evidence is admissile to locate the commencement corner of a grant and to show that by an inadvertent error its location is improperly designated in the written description. *Davidson* v. *Shuler's Heirs*, 119 N. C. 582 (26 S.E. Rep. 340). But where a deed describes the boundary line as running from a given point in a certain direction to a specified quarter section corner to a stake, there is no latent ambiguity and parol evidence is inadmissible to show that there is no stake at the designated corner, but that there is a stake on the line at another point. *Donehoo* v. *Johnson*, 118 Ala. 126 (21 So. Rep. 70). In Georgia it is held that parol evidence is admissible to explain an ambiguity as to the county in which particularly described lands are situated. *Mayor of Chauncey* v. *Brown*, 99 Ga. 766 (26 S. E. Rep. 768). Where a lease describes the premises as "lot No. in assessor's subdivision of Whiting's block No. 8," in a certain town and county, it is held that the omission of the number of the lot is such an ambiguity as may be removed by parol evidence. *Marske* v. *Willard*, 169 Ill. 276 (48 N. E. Rep. 290). Where a testator devised all his "up lands," and there was evidence tending to show that he owned no uplands, strictly so called, but that his lands were in part

"bottom land" and the rest, "second bottom" or "bench lands," there is a latent ambiguity and it is competent to show by other evidence that he regarded second bottom or bench lands as up lands and in that sense employed the term upland in his will. *Vandiver* v. *Vandiver*, 115 Ala. 828 (22 So. Rep. 154). Where a deed conveys the "west half" of a tract of land, parol evidence is inadmissible to show that there are twenty acres in the tract known as the "west half" as there is no ambiguity on the face of the deed. *Owen* v. *Henderson*, 16 Wash. 89 (47 Pac. Rep. 215; 58 Am. St. Rep. 17). Where land was assessed to an unknown owner and sold for taxes under a description as the "east fractional section 12, township 6, range 6 W.," parol evidence was held admissible to show that it was the same land as "lot 6 McLeod's addition west side of river, section 12, township 6, range 6 W.," which had been assessed to another and taxes paid thereon. *Gordon* v. *Kitrell*, - Miss. (21 So. Rep. 922). Applying Miss. Code, § 8776, it is held that where a tax deed describes property as "fractional thirty-eight acres in S. E. ¼ of N. W. ¼" assessed to C., evidence of the location of a two-acre tract in such forty-acre tract, assessed to another person, is admissible to identify the thirty-eight acres. *Illinois Cent. R. Co.* v. *Le Blanc*, 74 Miss. 650 (21 So. Rep. 760). A description of land as "a certain tract or parcel of land lying between P.'s land and C.'s creek and the old mill race," is not too indefinite to be aided by parol evidence. *Sherman* v. *Simpson*, 121 N. C. 129 (28 S. E. Rep. 186). A description of land conveyed as "a certain quantity of land containing 350 acres, being in six different deeds, the courses and distances referred to the original grants, which are six, lying on" a certain river, is too indefinite to permit the introduction of parol evidence to identify another deed to the grantor for fifty acres as being part of the land conveyed. *Hemphill* v. *Annis*, 119 N. C. 514 (26 S. E. Rep. 152).

EASEMENTS.

CLEMENTS V. PHILADELPHIA CO.

(184 Pa. St. 28.)

Abandonment of easement for gas pipe line—Removal of pipes—Measure of damages. A gas company which has acquired an easement by appropriation under Pa. Act May 29 1885, to lay and maintain a pipe line for the transportation of natural gas may upon the failure of gas, remove its pipes from the land and abandon the easement. Upon such removal the company is liable to the landowner for any actual injury to growing grain or grass, and, if the field be in meadow, for any substantial injury to the turf beyond the mere opening and filling of the trench in which the pipe lay.

WILLIAMS, J.

Sec. 225. Statement of the case. This case presents a somewhat novel question. The defendant company is engaged in the production and transportation of natural gas. In 1888 it acquired, by proceedings under the act of May 29, 1885, the right to lay its line of pipes by means of which its gas was transported in and upon the lands of the plaintiffs, and damages were duly assessed and paid to them for the injury sustained by reason of the appropriation of the easement to the use of the company. In 1893 the wells supplying the pipe line ceased to produce natural gas in marketable quantity, and the line became useless. It was abandoned as a line of transportation, and the pipe composing it became useless where it was, and was taken up and removed. It had been buried, as "the law required" not less than two feet below the surface, and its removal required the opening of the trench in which it had been placed, the lifting of the pipes to the surface and the hauling of them away upon wagons. This was done in March, 1893, and this action was thereupon brought to recover the damages sustained by the plaintiffs in consequence of the abandonment and removal of the line from their lands. The question thus raised is over the measure of damages to which the plaintiffs are entitled. This

must depend upon the consideration of two preliminary questions; first. What was the character and extent of the easement acquired by the defendant under the proceeding had under the act of May 29, 1885? This is a question of law. The other is to what extent, if at all, the defendent has exceeded the limits of its right under the easement so acquired. This is a question of fact.

Sec. 226. Construction of statute providing for the acquisition of an easement for laying gas pipe line — Right to remove pipes — Measure of damages. The act of 1885 confers the right of eminent domain "for the laying of pipe lines for the transportation and distribution of natural gas," to be exercised in the manner pointed out. If the line is laid "upon or over lands cleared and used for agricultural purposes, the line of pipe shall be buried at least twenty-four inches below the surface; and if any line of pipe shall be laid over or through any waste or wood land, which shall be changed to farming land, then it shall be the duty of the corporation to immediately bury the said pipe to the depth of at least twenty-four inches as aforesaid." The easement acquired by the company is for the laying of the gas pipe beneath the surface of cleared land, or, as expressed by the act itself, for "burying" the pipe at least twenty-four inches below the surface in all such lands. The company does not require, nor is it to the interest of the land owner, that it should appropriate a definite strip of surface of 12 feet in width, as suggested by the learned judge of the court below, or of any other width, to which it shall have an exclusive right of possession as against the landowner. What is needed is the space under the surface in which the pipe may rest, together with the right to deposit or "bury" it out of the landowner's way, and the right of access to it for purposes of maintenance and repairs. Subject to the easement so defined, the landowner continues in the possession and use of the entire surface as freely as before the "burial" of the pipe took place; and if the "burial" of the pipe is properly done, and the joints are made secure, the presence of the pipe line under the soil will in no way interfere with its cultivation or use. But the unlooked for failure of the gas wells compel the abandonment of the line as a

means of transporting and distributing gas. It had no value for any other purpose. The material belonged to the company, and it had a clear right to remove the pipe from its bed and utilize it in whatever manner might seem best. The proceedings under the right of eminent domain had not affected the title to the pipe, or imposed any obligation on the company to maintain the line any longer than its own interests might dictate. The sole object and effect of the appropriation was to secure the right to transport natural gas across the lands of the plaintiffs in the manner provided for by the act of 1885. The damages were assessed with reference to the fact that the company acquired thereby a right to enjoy the easement indefinitely; yet if it happened that the supply for which the pipe line afforded the means of transportation should cease, it was within the knowledge and contemplation of the parties that the line would become useless, and that its abandonment must follow. In such a contingency the company may surrender the easement for which it has paid, and remove its pipes from the land. This is in ease of the owner. A right of entry exists for this purpose, and if the removal is conducted with a due regard to the interests and rights of the landowner, there is no ground for complaint on his part that the easement has been surrendered by a removal of the material that has been "buried" in his soil. But if the work has not been properly done, if the trench is left open or but partially filled, if the growing crops or grass are broken down or destroyed, or the turf unnecessarily cut into or injured, the owner has a right to complain. The right of entry was incident to the laying and care of the line while the easement was being enjoyed, and when its enjoyment was no longer possible it was an incident to the right to withdraw from the land and surrender the privilege acquired under the right of eminent domain. But neither while the line was in use nor after its use had ceased did the right of entry authorize the doing of any substantial injury to the owners beyond the burying or removal of the pipe in the best way practicable. If it was to the interests of the company to remove its pipe in wet weather, and in doing so to drive over the plaintiffs' fields on the dryest routes it could find, thereby injuring the crops or grass, there is no reason why it should not pay for the injury so done. The

measure of damages to which the plaintiff is entitled is the extent of the injury done him by the removal of the pipes at an improper time, or in an improper manner. The nature and extent of the easement permitted the cultivation of the surface over the pipe line in subordination to the rights of the company to enter upon it whenever such entry became necessary. If, because of an exercise of the right of entry incident to the easement, growing crops were disturbed, this was *damnum absque injuria* as to the surface necessarily occupied for the purposes for which the entry was properly made. An entry for the purposes of removal stands however upon somewhat different grounds. It is not made because of the necessities of transportation, but because they no longer exist. It is therefore the duty of the company to make the removal at the time and in the manner best adapted to the purpose and least harmful to the landowner. It is the duty of the company, upon a surrender of its easement, to fill the trench it has opened so as substantially to restore the surface of the land, and its failure to do so is just ground of complaint. It should make compensation for any actual injury to growing grain or grass and, if the field be in meadow, for any substantial injury to the turf beyond the mere opening and filling of the trench in which the pipe lay. Subject however to the limitations now indicated it has the right to enter and remove its pipe without being liable as a trespasser therefor. The judgment is reversed that the proper measure of damages may be given to the jury, and a venire *facias de novo* is awarded.

Sec. 227. Abandonment of easement acquired for public use.—Removal of improvements. In Lewis on Eminent Domain, § 598, the author says: "Where only an easement is taken and the public use is abandoned, the land reverts to the original owner, but he acquires no right to any accessions which have been placed upon it by the state or its agents. Where a canal was abandoned by the state, it was held that its assignee might remove the materials in the locks and other works, *Corwin* v. *Cowan*, 12 O. St. 629; so in another case it was held that a railroad company might remove stone piers from land it proposed to abandon. *Wagner* v. *Cleveland & Toledo R. R. Co.*, 22 O. St. 563 (10 Am. Rep. 770)." In this last case the court say: "The use of the strip of land on which the piers were built, was granted to the railroad company for the purpose of constructing part of a continuous line of railroad which it was authorized to build and operate. The piers were as much a part of the road as the bridges they were

designed to support, or the rails and ties on the road. The use the road was intended to subserve, and to which alone it was adapted, was the transportation of persons and property. The road and all its parts was merely accessory to this business, and were put on the land for this purpose, and not as accessions to the land over which the railroad was to pass. The part of the road built on the premises of the plaintiff in error, disconnected from the other parts of the road, could not be operated, and would be useless as a railroad. Nor could it serve any useful purpose as an appurtenance to the land on which it was built. It is possible that in some instances, by changing the character of the structure and diverting it to other purposes than those for which it was designed, it might afford some incidental benefit to the lands; but, generally, the value of the structure would consist in what it would be worth disconnected from the land as personal property. Such, at least, appears to be the character of the structures now in question. If the piers were the property of the land owner, they became his as they were built, the company only retaining the right to use them in operating its road. We do not understand such to be the effect of the agreement of the parties. The railroad company aqcuired an easement in the land to construct and use its road thereon. It did not bind itself to the land owner, either to build or maintain the road; and it could change the character of the structure at pleasure. Nor do we perceive any good reasbn why, in the act of building it should lose its right of property in the structure when built, or in the materials of which it was composed. The land owner retained his land subject to the easement, and the company owned the easement and the structures it was designed to support. We attach no importance to the fact that the company, at the time of the attempted removal of the stone, had abandoned the idea of completing the road. If the piers had not before that time become the property of the land owner the abandonment of the enterprise would not make them his. The right to abandon the purpose of completing the road, it seems to us, carries with it the right to remove the structures put on the land solely as a part of the road equally as the right to construct and use the road, carries with it the right to change, remove and renew the materials of which it is composed." And in support of its holding the court cites, *Northern Central R. W. Co.* v. *Canton Co.*, 30 Md. 347.

EPITOME OF CASES.

Sec. 228. As to what constitutes an easement—Use by owner. The right of a railroad company to discharge ditches for draining its right of way upon adjacent lands, is in the nature of an easement and damages should be awarded to the servient owner accordingly. *Beach* v. *Wilmington & W. R. Co.*, 120 N. C. 498 (26 S. E. Rep. 703). A perpetual easement to overflow land does not pass by the parol acceptance of a parol award of damages made under a

parol agreement for arbitration where it does not appear that the award was ever paid or any receipt given for the damages. *Wilmington Water-Power Co.* v. *Evans*, 166 Ill. 548 (46 N. E. Rep. 1083). The owner of an easement in the land of another is not bound to use it in the particular manner prescribed by the instrument which creates it. He may use it in a different manner if he so desires, provided he does not, in doing so, increase the servitude, nor change it, to the injury of the owner of the servient tenement. *Tallon* v. *Mayor of City of Hoboken*, 60 N. J. L. 212 (37 Atl. Rep. 895).

Sec. 229. Creation by grant. An easement may be created by a covenant in a deed and the benefit of it may be claimed by subsequent grantees and occupants. *Morton* v. *Thompson*, 69 Vt. 432 (38 Atl. Rep. 88). A right of way created by grant is not lost by a temporary failure to locate and use a part of it. *Quigley* v. *Baker*, 169 Mass. 303 (47 N. E. Rep. 1007). Where one owning a tract of upland and also a separate tract fronting on the sea, conveyed to another and his heirs, by warranty deed, the tract of upland, and after describing it by metes and bounds, continued as follows: "Together with the free use and full right of sufficient land on my sea front for bathing purposes, with the right to enter thereon, erect bath houses, and use the same, free of charge, undisturbed at any time," it is held that the deed gave the grantee an easement of way over the grantor's land to the sea, but the privilege in regard to the erection and use of bath houses was a license revocable by the death of the parties or by a subsequent conveyance. *Eckert* v. *Peters*, 55 N. J. Eq. 379 (36 Atl. Rep. 491). Negative easements, by which the owner of lands is restricted in their use in favor of other lands, not owned by him, can only be created by covenant or by exception, limitation, or condition under which he derives his title, and a covenant creating such restrictive easements must be shown by apt words and words which fairly interpreted show a clear intent to create such an easement. *Goodwin* v. *Hamersley*, 69 Conn. 115 (36 Atl. Rep. 1065). For construction of particular grants of easements for a way, see *Morton* v. *Thompson*, 69 Vt. 432 (38 Atl. Rep. 88); *Botsford* v. *Wallace*, 69 Conn. 263 (37 Atl. Rep. 902).

Sec. 230. Creation by executed parol license. An executed parol license may become an easement upon the land of another and may embrace a servitude on one estate in favor of another. *Joseph* v. *Wild*, 146 Ind. 249 (45 N. E. Rep. 467). Citing, *Nowlin* v. *Whipple*, 120 Ind. 599 (22 N. E. Rep. 669; 6 L. R. A. 159.); *Hazleton* v. *Putnam*, 3 Pin. 107, 3 Chand. 117 (54 Am. Dec. 158, and note, 166); *Dark* v. *Johnston*, 55 Pa. St. 170 (93 Am. Dec. 732); *Huff* v. *McCauley*, 53 Pa. St. 206 (91 Am. Dec. 203); *Thompson* v. *McElarney*, 82 Pa. St. 174; *Meek* v. *Breckenridge*, 29 O. St. 642, 650; *Legg* v. *Horn*, 45 Conn. 415; 2 Am. Lead. Cas. 577, 578; Washb. Easem. (4th Ed.) pp. 27–29.

Sec. 231. Creation by prescription. The rule that a public way may be acquired by user for the prescriptive period, is held not to apply when the user is of wild, uninclosed prairie land. *Engle* v. *Hunt*, 50 Neb. 358 (69 N. W. Rep. 970). Citing, *Graham* v. *Hartnett*, 10 Neb. 517 (7 N. W. Rep. 280). To establish a way by prescription, the use must be not only open, adverse, uninterrupted, peaceable, continuous and under a claim of right, but must be confined substantially to the same route, and to substantially the same purpose, for which the way was designed originally, unless the way is one for all purposes. *Hoyt* v. *Kennedy*, 170 Mass. 54 (48 N. E. Rep. 1078). The right to a way cannot arise from a mere permissive use without claim of right. *Thornton* v. *Louisville & N. R. Co.*, Ky. (39 S. W. Rep. 694.) The mere use of a passageway over the land of another without his permission, does not confer any title until the use has been continued for the prescriptive period. *Young* v. *Conrad*, Ky. (38 S. W. Rep. 497). But when one who is the owner of a tract of land uses a way over the land of another for covenience of egress and regress to his own land without let or hindrance and without obstruction, for the prescriptive period, he thereby, in the absence of any thing to the contrary, acquires a right by prescription to its use as an incident to his land, and this right will pass by a conveyance or descent of the land. *Pavey* v. *Vance*, 56 O. St. 162 (46 N. E. Rep. 898). The use of a way for the prescriptive period creates a presumption that the use was adverse, and the owner

of the servient estate has the burden of showing the contrary. *Lisle* v. *Embry*, Ky. (42 S. W. Rep. 98); *Burch* v. *Blair*, Ky. (41 S. W. Rep. 547); *Pavey* v. *Vance*, 56 O. St. 162 (46 N. E. Rep. 898). Citing, *Garrett* v. *Jackson* 20 Pa. St. 331; *O'Daniel* v. *O'Daniel*, 88 Ky. 185 (10 S. W. Rep. 638). Where land is claimed as a street by a city on the ground of a prescriptive use, evidence of acts by the city in reference to such ground inconsistent with the claim of the easement, during the prescriptive period, are admissible. *Illinois Cent. R. Co.* v. *City of Bloomington*, 167 Ill. 9 (47 N. E. Rep. 318). For particular cases in which an easement was held to be established by use for the prescriptive period, see *City of Chicago* v. *Sawyer*, 166 Ill. 290 (46 N. E. Rep 759); *City of Chicago* v. *Homes*, 169 Ill. 260 (48 N. E. Rep. 408); *Benedict* v. *Johnson*, Ky. (42 S. W. Rep. 335). Same, in which the right to an easement was held not to exist. *Engle* v. *Hunt*, 50 Neb. 358 (69 N. W. Rep. 970); *Mills & Allen* v. *Evans*, 100 Ia. 712; (69 N. W. Rep. 1043).

Sec. 232. Appurtenant or implied easements. Where a lessor conveys to his lessee leased premises "with the appurtenances thereto," the lessee takes an easement in adjoining land of the lessor for conducting water therefrom to supply a fish pond on the land conveyed, through pipes laid by him for that purpose, under an express provision in the lease and in use at the time of the conveyance. In an action against a grantor for an interference with such easement by diverting the water, the measure of damages is what the grantee lost in the diminished value of the use of the pond. *Spencer* v. *Kilmer*, 151 N. Y. 390 (45 N. E. Rep. 865). Where the owner of a body of land divides it among his children by conveyances to them, each takes it subject to or benefitted by such burdens as were openly or plainly attached to or imposed on it by the common owner in his use and enjoyment of the land at the time of the severance and which on a severance would properly be termed "easements" or "servitudes." *Baker* v. *Rice*, 56 O. St. 463 (47 N. E. Rep. 658). Where, from the construction of a building it was plainly not intended that the elevator should be used for hoisting goods from the basement room to the side walk on the street, or for

lowering goods to the basement room, the right to such use of it will not be implied, there being other convenient means of access from the sidewalk to the basement, in favor of the lessee of the basement from a grant of the use of such elevator for carrying goods from the basement to other parts of the building. *Cummings* v. *Perry*, 169, Mass. 150 (47 N. E. Rep. 618; 38 L. R. A. 149). A grantee cannot claim an appurtenant easement as against lands not owned by the grantor at the time of his conveyance although he subsequently acquired title thereto. *Spencer* v. *Kilmer*, 151 N. Y. 390 (45 N. E. Rep. 865). Particular facts held to show the existence of an easement for the use of a well near the dividing line between two lots in favor of the lot upon which it is not located. *Eliason* v. *Grove*, 85 Md. 215 (36 Atl. Rep. 844.

Sec. 233. Lateral support—Light and air. The right to lateral support is confined to the land in its natural condition and if the pressure of a superstructure causes the land to fall, an adjoining owner is not liable either for injury to the land or superstructure. *Hemsworth* v. *Cushiug*, 115 Mich. 92 (72 N. W. Rep. 1108); *Obert* v. *Dunn*, 140 Mo. 476 (41 S. W. Rep. 901). The first case cited follows and specially approves the case of *Gildersleeve* v. *Hammond*, 109 Mich. 431 (67 N. W. Rep. 519; 33 L. R. A. 46) epitomized at length in Ballards' Law Real Prop., Vol. V., § 208. For construction of particular covenant against the obstruction of light and air, see *Chase* v. *Walker*, 167 Mass. 293 (45 N. E. Rep. 916).

Sec. 234. Way of necessity. The doctrine of a way of necessity applies in partition of lands made by deed, or by proceedings in court in favor of any tract allotted, which is not accessible from a highway except over the tract or tracts allotted to others. *Ritchey* v. *Welsch*, 149 Ind. 214 (48 N. E. Rep. 1031; 40 L. R. A. 105). Citing, *Viall* v. *Carpenter*, 14 Gray 126; *Blum* v. *Weston*, 102 Cal. 362 (36 Pac. Rep. 778; 41 Am. St. Rep. 188). A purchaser of a strip of land adjoining his lot, which abuts upon the street, cannot claim a way of necessity over his grantor's other land, because his lot which abuts upon the street, is almost covered with a building. *Botsford* v. *Wallace*, 69 Conn. 263 (37 Atl. Rep.

902). One entitled to a way of necessity over certain lands of another, cannot be deprived of his right by such other person offering him a private way over other lands owned either by himself or others. *Ritchey* v. *Welsch*, 149 Ind. 214 (48 N. E. Rep. 1031; 40 L. R. A. 105). A vendee in possession, who is entitled to a way of necessity over the land of his vendor, which he is using, has a right to enforce such easement against the purchaser of the exterior lots, although the latter acquired title before a deed had been given to the former. *Pleas* v. *Thomas*, 75 Miss. 495 (22 So. Rep. 820).

Sec. 235. Way of necessity—Implied reservation. Where the owner of a tract of land who has made and maintained a private way over his land to a public highway, and such way is his only means of ingress and egress to his home, sells and conveys to another a portion of it lying on the public highway, and is thereby deprived of all access to the highway except by the way he had previously constructed and maintained, and which passes through the granted part, and the facts were well understood by both parties at the time, in such case, the way is reserved to the lands of the grantor by implication, although the deed contains a covenant against incumbrances. It is a general rule that one cannot derogate from his grant; so that, to warrant the inference of a way reserved by implication, it must be one of strict necessity to the remaining lands of the grantor. It is not merely a matter of convenience, and, if the grantor has another mode of access to his land, however inconvenient, he cannot claim a way by implication in the land conveyed, though he may have been in the use of a way over it to a public highway at and a long time before the conveyance, and of which the grantee had notice at the time. *Meredith* v. *Frank*, 56 O. St. 479 (47 N. E. Rep. 656).

Sec. 236. Way of necessity—Location. Where one has the right of way of necessity across premises owned or occupied by another, unless he waives it, the other has the right to fix the location of the way, provided it is reasonably convenient for the use of the one having it. *Jenne* v. *Piper*, 69 Vt. 497 (38 Atl. Rep. 147). In the case of *Ritchey* v.

Welsch, 149 Ind. 214 (48 N. E. Rep. 1081; 40 L. R. A. 105), the supreme court of Indiana say: "When no prior use of the way has been made, and the same is to be located for the first time, the owner of the land over which the same is to pass has the right to choose it, provided he does so in a reasonable manner, having due regard to the rights and interests of the owner of the dominant estate. But if the owner of the land fail to select such way when requested, the party who has the right thereto may select a suitable route for the same, having due regard to the convenience of the owner of the servient estate. *Holmes* v. *Seely*, 19 Wend. 507, 510; *Russell* v. *Jackson*, 2 Pick. 578; *Capers* v. *Wilson*, 8 McCord 170; Godd. Easem. (Bennett's Ed.) 848, 850. When the way is once selected, it cannot be changed by either party without the consent of the other. *Nichols* v. *Luce*, 24 Pick. 102 (35 Am. Dec. 302); *Holmes* v. *Seely*, 19 Wend. 507, 510; *Morris* v. *Edgington*, 3 Taunt. 23; Godd. Easem. (Bennett's Ed.) 851."

Sec. 237. Abandomment or extinguishment of easement. Mere nonuser of a portion of the width of a street will not work an abandoment of the public rights therein. *City of Madison* v. *Mayers*, 97 Wis. 399 (73 N. W. Rep. 43; 65 Am. St. Rep. 127; 40 L. R. A. 635). The public may lose an easement by nonuser accompanied by occupancy by an adjoining proprietor. *Vincent* v. *City of Kalamazoo*, 111 Mich. 230 (69 N. W. Rep. 501). See Estoppel. Where one having the right to use a gangway across lands of several persons, conveys to the owner of the premises adjacent to her land all her right to the use of the way across such premises, thereby cutting off all access to her property by such gangway, thereby terminates her right to use the portion of the way across the other lands. *Johnson* v. *Grant*, 20 R. I. 174 (37 Atl. Rep. 707). Particular evidence held sufficient to show an abandonment of an easement. *New York, N. H. & H. R. Co.* v. *Benedict*, 169 Mass. 262 (47 N. E. Rep. 1027).

EJECTMENT.

EPITOME OF CASES.

Sec. 238. As to when the action will lie. A lot owner cannot maintain ejectment to remove an underground wall erected by an adjoining owner which encroaches upon his land, where it is used to sustain his building and it does not deprive him of the full and free possession and enjoyment of his entire lot. *Zander* v. *Valentine Blatz Brewing Co.*, 95 Wis. 162 (70 N. W. Rep. 164). The action may be maintained against a municipal corporation entering upon and holding possession of the land of another, *Mayor of Chauncey* v. *Brown*, 99 Ga. 766 (26 S. E. Rep. 768); or against a vendor who reenters on account of the nonpayment of purchase maney notes, where his contract of sale does not make such nonpayment a ground for forfeiture or rescission. *Usher* v. *Hollister*, 58 Kan. 431 (49 Pac. Rep. 525). Ejectment will not lie against a husband merely occupying lands with his wife without claiming title or right of possession and whose acts concerning the land are performed merely as a servant or employe of his wife who claims to have the right of possession. *Danihee* v. *Hyatt*, 151 N. Y. 493 (45 N. E. Rep. 939). In Massachusetts ejectment will lie to recover the unexpired term of a lease, but the action can only be maintained by one who has the right of possession. *Austin* v. *Kimball*, 167 Mass. 300 (45 N. E. Rep. 627). The fact that a subtenant may be ejected under a judgment against the original lessee, does not authorize the entry of a judgment against him on a warrant of attorney not signed by him. *Stewart* v. *Jackson*, 181 Pa. St. 549 (37 Atl. Rep. 518). A land owner, who has consented to the occupation and use of his lands by a railroad, cannot maintain ejectment against it. *Fries* v. *Wheeling & L. E. Co.*, 56 O. St. 135 (46 N. E. Rep. 516); *Atexander* v. *Kansas City, F. S. & M. R. Co.*, 138 Mo. 464 (40 S. W. Rep. 104). See Ballard's Law Real Rep. Vol. III, §§ 238–240. Applying Miss. Laws 1894, p. 99, § 1, it is held that ejectment will not lie to recover land appro-

priated for levee purposes. *Owens* v. *Yazoo-Miss. Delta Levee Board*, 74 Miss. 269 (21 So. Rep. 12). Construing and applying Starr & C. Ann. Ill. Stat., Vol. 2, p. 982, providing that " if the premises are not occupied, the action shall be brought against some person exercising acts of ownership on the premises claimed, or claiming title thereto, or some interest therein, at the commencement of the suit, " it is held that where premises are not occupied the action may be maintained agains a person claiming title thereto at the commencement of the suit. *Converse* v. *Dunn*, 167 Ill. 25 (46 N. W. Rep. 747). The principle of this case is approved in *Glos* v. *Bouton*, 170 Ill. 249 (48 N. E. Rep. 949).

Sec. 239. Sufficiency of the complaint. A complaint to recover possession of a mining claim need not allege that the plaintiff is a citizen of the United States or has declared his intention to become such, as is required to be shown in adversary proceedings under U. S. Rev. Stat. § 2326; but where his allegation of ownership is to be established by virtue of a location under the statutes of the United States, it is necessary for him to prove all the facts necessary to qualify him for such location, one of which is citizenship or a declaration to become a citizen. *Harris* v. *Kellogg*, 117 Cal. 484 (49 Pac. Rep. 708). A complaint is insufficient where the description given of the property which it seeks to recover is so indefinite that it is impossible to definitely locate the land. *Goodwin* v. *Forman*, 114 Ala. 489 (21 So. Rep. 946). Where a complaint is insufficient on account of its failure to sufficiently describe the premises, it will not sustain a judgment correctly describing the portion of the land recovered. *Bricken* v. *Cross*, 140 Mo. 166 (41 S. W. Rep. 735). Particular amended complaint held insufficient to show title by adverse possession. *Magnetic Ore Co.* v. *Marbury Lum. Co.*, 113 Ala. 306 (21 So. Rep. 36).

Sec. 240. Parties to the action. Upon the death of the defendant the action shall be revived against his widow and heirs, and his administrator not in possession of the land is not a necessary party, although the decedent's will gave him a general power of sale. *Estes* v. *Nell*, 140 Mo. 639 (41

S. W. Rep. 940). Construing and applying the Statute of 11 Geo. II, ch. 19, § 13, it is held that a person applying to be admitted as a party defendant in an action of ejectment, must show by his application that his title is connected to, and consistent with, the possession of the occupier against whom such action is brought; and the court has no power on the application of a third person claiming, as landlord, the right to be admitted as a party defendant, to vacate and set aside a default and a verdict and judgment already entered against the defendant in such suit. *State* v. *Call*, 89 Fla. 165 (22 So. Rep. 266).

Sec. 241. Title necessary to maintain ejectment—Prior possession. Under Okla. Code Civ., Proc. § 614, it is held that one having an equitable title to land may maintain the action. *Laughlin* v. *Fariss*, 7 Okla. 1 (50 Pac. Rep. 254). The title of the plaintiff will not be regarded as speculative because the deed under which he acquires title contains a covenant of warranty which he expects to enforce in case he loses the land. *Bradley* v. *Drayton*, 48 S. C. 284 (26 S. E. Rep. 613). Except as affected by the mining laws a trespasser in possession of the surface of land has the same right to eject a subsequent trespasser who enters beneath the surface as he would were he to enter upon the surface. *Lincoln-Lucky & Lee Min. Co.* v. *Hendry*, N.M. (50 Pac. Rep. 330). A person who holds possession of real estate under a claim of ownership is entitled to recover the same as against one who has no right or title to it. *Hentig* v. *Pipher*, 58 Kan. 788 (51 Pac. Rep. 229); *Stephens* v. *Hambleton*, Cal. (47 Pac. Rep. 51); *Branch* v. *Smith*, 114 Ala. 468 (21 So. Rep. 428). As against a defendant who relies upon possession only, it is sufficient for the plaintiff to show an actual, peaceable possession, under color of title prior in point of time, to the possession of the defendant. *John Henry Shoe Co.* v. *Williamson*, 64 Ark. 100 (40 S. W. Rep. 703). Citing, *Cook* v. *Bertram*, 86 Mich. 356 (49 N. W. Rep. 42); *McFarlane* v. *Ray*, 14 Mich. 465; *Christy* v. *Richolson*, 48 Kan. 177 (29 Pac. Rep. 398). To the same effect is the case of *Hall* v. *Gallemore*, 138 Mo. 638 (40 S. W. Rep. 891). It is held proper to deny a defendant's motion for a nonsuit,

where it appears that the plaintiffs bought the property from its owner and took a bond for the deed under which they entered into and held possession of the property claiming title thereto for more than two years before defendant entered and ousted them. *Stephens* v. *Hambleton*, Cal. (47 Pac. Rep. 51). As to what is sufficient proof of title by proof of possession, see *Elofrson* v. *Lindsay*, 97 Wis. 22 (71 N. W. Rep. 889).

242. Proof required of plaintiff—Tracing title to common source. In order for the plaintiff to recover, he must prove not only the legal title in himself, but a present right to possession. *Wells* v. *Steckelberg*, 52 Neb. 597 (72 N. W. Rep. 865; 66 Am. St. Rep. 529). He cannot recover where he shows no title, whether the defendant's title be valid or not, *Stephens* v. *Moore*, 116 Ala. 397 (22 So. Rep. 542); and he must show that defendant was in possession at the time his suit was brought. *Sowles* v. *Carr*, 69 Vt. 414 (38 Atl. Rep. 77). Under Ind. Rev. Stat. 1894, § 1069, the plaintiff must recover upon the strength of his own title and he is not aided by the defendant's failure to establish any title. *Graham* v. *Lunsford*, 149 Ind. 88 (48 N. E. Rep. 627). A special finding will not support a judgment in favor of the plaintiff, where it fails to allege that she was the owner and entitled to possession at the time of the commencement of the action. These facts will not be presumed from other facts found. *Craig* v. *Bennett*, 146 Ind. 574 (45 N. E. Rep. 792). Proof of adverse possession by the plaintiff for the prescriptive period is sufficient, where such possession, during all that time, was so open that any other person could have brought suit to eject the plaintiff. *Beecher* v. *Farris*, 112 Mich. 584 (70 N. W. Rep. 1106). In Idaho it is held that a party bringing an action of ejectment is required to establish, in order to recover, the right to possession, possession in the plaintiff, and ouster by defendant. Proof of a state of facts that might entitle a party to recover in an action to quiet title, under Rev. Stat. § 4538, is not sufficient. *McMasters* v. *Torsen*, Idaho (51 Pac. Rep. 100). A plaintiff cannot recover solely upon the ground that he was in adverse possession of the land at the time defendant purchased it. *Moran* v. *Higgins*, Ky. (40 S. W. Rep. 928).

Where plaintiff and defendant claim title from a common source, plaintiff is not required to prove his title beyond such source. *Cave* v. *Anderson*, 50 S. C. 298 (27 S. E. Rep. 698); *Preiner* v. *Meyer*, 67 Minn. 197 (69 N. W. Rep. 887). In such a case it is enough for the plaintiff to show a better title through the common source than the defendant can show from the same source. Before a defendant can be allowed to impeach the common source he must establish that he has acquired a superior title. To show a better title outstanding will not help him. *Sell* v. *McAnaw*, 138 Mo. 267 (39 S. W. Rep. 779). The rule is not changed by a claim on the part of the defendant that the title to the land is in the United States, he showing no conveyance or certificate connecting him with title from that source. *Preiner* v. *Meyer*, 67 Minn. 197 (69 N. W. Rep. 887).

Sec. 243. Defenses in ejectment—Plea of "not guilty"—Equitable defenses. In Alabama under the plea of "not guilty," anything that operates as a bar to the action may be given in evidence. *Smith* v. *Cox*, 115 Ala. 508 (22 So. Rep. 78). In Florida it is held that equitable estoppels are proper defenses in actions of ejectment and evidence of such estoppels, is admissible under the plea of "not guilty." *Hagan* v. *Ellis*, 39 Fla. 468 (22 So. Rep. 727; 63 Am. St. Rep. 167). Citing, *Dickerson* v. *Colgrove*, 100 U. S. 578; *Kirk* v. *Hamilton*, 102 U. S. 68; *Berry* v. *Seawall*, 18 C. C. A. 101 (65 Fed. Rep. 742); *Tyler* v. *Hall*, 106 Mo. 318 (17 S. W. Rep. 319; 27 Am. St. Rep. 337); *Mayer* v. *Ramsey*, 46 Tex. 371. In Minnesota it is held that where the plaintiff has the legal title to the property in controversy, a defendant who depends upon an equitable title as a defense, must set up and allege his equities in his answer so fully and completely that a court of equity would, under the old practice, have granted him adequate relief and have confirmed his right of possession as against the holder of the adverse legal title. *Freeman* v. *Brewster*, 70 Minn. 208 (72 N. W. Rep. 1068). Md. Code, Art. 75, § 83 applied—pleading an equitable defense. *Shartzer* v. *Mountain Lake Park Ass'n*, 86 Md. 385 (37 Atl. Rep. 786).

Sec. 244. Defenses in ejectment—Title by adverse possession—Outstanding title. A defendant may defend by showing title by adverse possession. *Jennings* v. *Gorman*, 19 Mont. 545 (48 Pac. Rep. 1111.) Under an answer denying plaintiff's title and right to possession of the premises, the defendant may show title in himself by adverse possession. *Fink* v. *Dawson*, 52 Neb. 647 (72 N. W. Rep. 1087); *Oldig* v. *Fisk*, 53 Neb. 156 (73 N. W. Rep. 661). A certificate of purchase at a tax sale is sufficient evidence of title to support a defense of adverse possession thereunder. *Worthen* v. *Fletcher*, 64 Ark. 662 (42 S. W. Rep. 900). A defense based upon a claim of title by adverse possession, must show that the claim of title was perfected by a sufficient lapse of time at the time the suit was commenced. Starr & C. Ann. Ill. Stat., Vol. 2, p. 1547, applied. *Converse* v. *Dunn*, 166 Ill. 25 (46 N. E. Rep. 747). To defeat an action of ejectment by an outstanding title in a stranger, the defendant must show it to be a present, subsisting, operative, legal title, on which the owner could recover if asserting it in an action. It is not for the plaintiff to disprove its validity. *Parkersburg Industrial Co.* v. *Schultz*, 43 W. Va. 470 (27 S. E. Rep. 255). A defendant who is a mere trespasser cannot defend by showing an outstanding title in a third person with which he in no way connects himself, *Sullivan* v. *Eddy*, 164 Ill. 391 (45 N. E. Rep. 837); nor can a mortgagor or vendor as against his mortgagee or vendee. *Stanley* v. *Johnson*, 113 Ala. 344 (21 So. Rep. 823)

Sec. 245. Defenses in ejectment—Particular cases. One who defends his right of possession upon the ground that the government, state or national, has placed him in possession, must show that the right of the government is paramount to the right of the plaintiff. *Scranton* v. *Wheeler*, 113 Mich. 565 (71 N. W. Rep. 1091). A defendant in ejectment who has conveyed his interest to a co-defendant, may confess judgment in favor of the plaintiff, where it does not appear that such confession was induced by any improper motive or desire to injure his vendee. *Virginia & T. Coal & I. Co.* v. *Fields*, 94 Va. 102 (26 S. E. Rep. 426). Under a general denial and claim of title in an action

of ejectment, when the plaintiff does not set out the source of title, but on a trial relies on a tax title, it is competent for the defendant to introduce in evidence any fact which might show or tend to show that the plaintiff had no right of entry when the suit was brought, and which might tend to defeat the title of plaintiff, or show a want of consideration for the deed under which plaintiff claims title and right of entry. *Eastman* v. *Gurrey*, 15 Utah 410 (49 Pac. Rep. 810). Where the plaintiff claims title under foreclosure preceedings the validity of such proceedings cannot be questioned. *Northwestern Mortg. Trust Co.* v. *Bradley*, 9 S. Dak. 495 (70 N. W. Rep. 648). It is no bar to the action for the defendant to plead a prior action by the plaintiff's grantor, which was dismissed before trial, or the pendency of a proceeding by the plaintiff in a court having no jurisdiction. *Campbell* v. *Potts*, 119 N. C. 580 (26 S. E. Rep. 50). A defendant who, by his answer, not only disclaims any beneficial interest in the premises, but denies that he is in the possession or occupancy of them, and alleges that he is merely employed in their cultivation as the hired servant of another, has no right to litigate the title to the premises with the plaintiff. *Marks* v. *Jones*, 71 Minn. 274 (73 N. W. Rep. 961). Damages for trespass committed by plaintiff to lands of the defendant, contiguous to the lands involved in the action, cannot be claimed as a set off by the defendant. *Wigmore* v. *Buell*, 116 Cal. 94 (47 Pac. Rep. 927). A defendant may, by cross complaint, have a tax title asserted by the plaintiff, cancelled. *Rustin* v. *Merchants' & Miners' Tunnel Co.*, 23 Colo. 351 (47 Pac. Rep. 300). Ala. Code, § 2707, construed and applied—defenses allowed in action of ejectment by mortgagee. *Watson* v. *Herring*, 115 Ala. 271 (22 So. Rep. 28). Ala. Code, § 2698, construed and applied—plea of "not guilty"—special pleas. *Richardson* v. *Stephens*, 114 Ala. 238 (21 So. Rep. 949.)

Sec. 246. Evidence in actions of ejectment—Burden of proof. Where a defendant relies upon a tax deed for title, the plaintiff should be allowed to contest those matters in regard to which the statute makes a tax deed only *prima facie* evidence. *McMasters* v. *Torsen*, Idaho (51 Pac. Rep. 100). Where a defendant claims title by adverse pos-

session and introduces evidence to establish it, the plaintiff should be allowed in rebuttal to introduce evidence to the contrary. *Jennings* v. *Gorwan*, 19 Mont. 545 (48 Pac. Rep. 1111). Where the plaintiff assails the defendant's title based upon a decree foreclosing a mortgage, on the ground that the mortgage was paid at the time the proceedings to foreclose were begun, he has the burden of proof, which is not shifted by the defendant's allegation that certain receipts introduced by the plaintiff were forgeries. *Shrader* v. *United States Glass Co.*, 179 Pa. St. 623 (36 Atl. Rep. 330). Where lessees in an unexpired oil lease bring an action of ejectment they may, in support of their denial of an abandonment claimed by the defendants, testify as to their intentions in dealing with the property as they did. *Bartley* v. *Phillips*, 179 Pa. St. 175 (36 Atl. Rep. 217). Where the grants under which a plaintiff claims contain exceptions, the burden is upon him to prove that the land sued for is not included in an exception. *Harman* v. *Stearns*, 95 Va. 58 (27 S. E. Rep. 601). Where, in an action of ejectment against a lessee, he defends on the ground of a surrender of the premises, on this point he has the burden of proof. *Sowles* v. *Carr*, 69 Vt. 414 (38 Atl. Rep. 77). Where the evidence shows the title to premises in dispute was cast upon the plaintiff by descent, the defendant claiming title on account of adverse possession against plaintiff's ancestor has the burden of proof. *Collins* v. *Swanson*, 121 N. C. 67 (28 S. E. Rep. 65). Particular evidence held to show that defendant claimed title under her husband. *Bradley* v. *Drayton*, 48 S. C. 284 (26 S. E. Rep. 618). Particular evidence held to constitute a variance from the complaint as to the identity of the property. *Griffin* v. *Hall*, 115 Ala. 482 (22 So. Rep. 162). For cases determining particular questions of evidence, see *Virginia & T. Coal & I. Co.*, v. *Fields*, 94 Va. 102 (26 S. E. Rep. 426); *Malone* v. *Arends*, 116 Ala. 19 (22 So. Rep. 500); *Wood* v. *Chapman*, 24 Colo. 184 (49 Pac. Rep. 186).

Sec. 247. Setting aside or directing verdict. Where the only issue tendered by the defendant is by counterclaim which is submitted to the court for trial, and the only issue presented by the plaintiff is submitted to the jury and the

court finds in favor of the defendant, it may properly set aside the verdict of the jury in favor of the plaintiff. *De Forest* v. *Walters*, 158 N. Y. 229 (47 N. E. Rep. 294). A verdict may be properly directed for the plaintiff, where his title is conclusively established and it cannot be found otherwise than that the tract in possession of the defendant was within the boundaries of the patent under which the plaintiff held. In re Heydenfeldt's Estate, 117 Cal. 551 (49 Pac. Rep. 718). Particular evidence held to authorize direction of a verdict for plaintiff. *Williams* v. *Milligan*, 188 Pa. St. 386 (38 Atl. Rep. 1015).

Sec. 248. Judgments in ejectment. A judgment in ejectment is insufficient where it fails to contain anything fixing the boundary of the land awarded to the plaintiff. *Franklin* v. *Haynes*, 139 Mo. 311 (40 S. W. Rep. 945). A writ of possession should not be issued upon a verdict from which it is impossible to ascertain what land is covered or to locate the same with any degree of certainty. *Hicks* v. *Brinson*, 100 Ga. 595 (28 S. E. Rep. 380). A court may correct a mistake in the judgment as to the description of the land recovered, where it is the result of a clerical error. Idaho Rev. Stat. § 4229. *Wilcox* v. *Wells*, Idaho (51 Pac. Rep. 985). A general judgment that plaintiff recover the whole of the premises as described in his complaint, is erroneous where a special verdict finds that the defendant is guilty of withholding a particularly described part of the premises. Starr & C. Ann. Ill Stat. Vol. 1, p. 987, §§ 80, 82, applied. *Cole* v. *McLaughlin* 170 Ill. 278 (48 N. E. Rep. 948). Under Neb. Code Civ. Proc. § 629, "In an action for the recovery of real property, where the plaintiff shows a right to recover at the time the action was commenced, but it appears that his right has terminated during the pendency of the action, the verdict and judgment must be according to the fact, and the plaintiff may recover for withholding the property." *Orr* v. *Broad*, 52 Neb. 490 (72 N. W. Rep. 850). An executed judgment for plaintiff in ejectment, where the suit was commenced within the period of limitation, is conclusive against the defendant of any asserted right founded merely upon his possession either at the time of the commencement of the action or at the time

of the judgment. *Broen* v. *Robrecht*, 118 Cal. 469 (50 Pac. Rep. 689; 62 Am. St. Rep. 247). Colo. Code, § 271, construed and applied—requisites of a judgment as specifying findings of a court—description of the property. *Argonaut Consol. Min. & Mill. Co.* v. *Turner*, 28 Colo. 400 (48 Pac. Rep. 685; 58 Am. St. Rep. 245).

Sec. 249. Practice in ejectment—Miscellaneous notes. The common law action of ejectment was not affected, nor the provisions of the Georgia Code applicable thereto repealed, by the pleading act, approved Dec. 15, 1893, Laws 1893, p. 56. *Brewster* v. *Woolridge*, 100 Ga. 805 (28 S. E. Rep. 43). See opinion for discussion of practice in ejectment in this state. In Kentucky it is held that in an action of ejectment, a court is not authorized to enter a decree quieting title in a defendant and enjoining the plaintiff from ever setting up any claim to the land. *Hildebrand* v. *Bunnschu*, Ky. (40 S. W. Rep. 920). A verdict in favor of the plaintiff cannot be modified by the defendant remitting "so much of the verdict as includes" certain land. *Duren* v. *Kee*, 50 S. C. 444 (27 S. E. Rep. 875). Where, in an action for the recovery of the possession of real property, damages are awarded for withholding the same, such damages should be assessed up to the day of trial; and where a judgment for damages is rendered in such an action, it will be presumed that the assessment was so made. *Abrahamson* v. *Lamberson*, 68 Minn. 454 (71 N. W. Rep. 676). The death of the plaintiff, or his conveyance of the land to another, does not abate the action in ejectment. The death of the defendant abates the suit, but the statute of limitations does not run during the pendency of the suit; and under How. Ann. Mich. Stat. § 8707, a plaintiff may bring action for the same cause at any time within one year after the suit is thus abated. *McKenzie* v. *A. P. Cooke & Co.*, 113 Mich. 452 (71 N. W. Rep. 868). Ill. Rev. Stat. ch. 45, § 80, cl. 5, authorizes a recovery of a part of the premises described in the complaint provided the verdict particularly describes the portion recovered. *Kleiner* v. *Bowen*, 166 Ill. 587 (46 N. E. Rep. 1087). See opinion for particular description held sufficient. A statute providing that in case of a nonsuit in an action brought for

land, a second suit must be brought in two years from the date of nonsuit, applies to a trustee who holds the legal title to land. *Benbow* v. *Levi*, 50 S. C. 120 (27 S. E. Rep. 655). Ala. Code, 1886, §§ 4204, 4259, construed and applied—prosecution against defendant for reentry after having been dispossessed by ejectment. *Wilson* v. *State*, 115 Ala. 129 (22 So. Rep. 567). Act Congress March 1, 1889, § 6; Act Congress May 2, 1890, § 31; Act Congress March 1, 1895, § 18; U. S. Rev. Stat. ch. 18, tit. 18; Mansf. Ark. Dig. ch. 55, 119, construed and applied—establishment of court in Indian Territory—pleading and practice in actions of ejectment. *Wilson* v. *Owens*, Ind. Ter. (38 S. W. Rep. 976). N. C. Code, § 390, applied—default judgment—failure of defendant to file bond. *Jones* v. *Best*, 121 N. C. 154 (28 S. E. Rep. 187). S. C. Code Civ. Proc. § 98, subd. 2, construed and applied—particular action held not to be an action "for the recovery of real property." *Elmore* v. *Davis*, 49 S. C. 1 (26 S. E. Rep. 898). S. C. Laws 1894, p. 823; Gen. Stat. §§ 1814–1816, construed and applied—summary proceedings to recover possession—appeal—notice. *Carlisle* v. *Prior*, 48 S. C. 183 (26 S. E. Rep. 244). Particular evidence held sufficient to raise an issue of fact which should go to the jury. *Kern* v. *Howell*, 180 Pa. St. 315 (36 Atl. Rep. 872; 57 Am. St. Rep. 641). Ala. Code (1896) § 1539—ejectment—when plaintiff barred of his writ—amended by Laws 1899, p. 33. Writ of possession can not be issued in New Jersey in an action for possession between landlord and tenant, tried before a justice of the peace, until three days after judgment is rendered. Laws 1899, p. 48.

EMINENT DOMAIN.

EPITOME OF CASES.

Sec. 250. Constitutional right of eminent domain —Construction of statutes. The legislative branch of the government alone has power to determine whether the exigency exists which calls for the exercise of the power of

eminent domain and where it has delegated its power to a municipal or public corporation, courts will not interfere with their exercise of it unless there has been an abuse of the power. *Chicago & A. R. Co.* v. *City of Pontiac*, 169 Ill. 155 (48 N. E. Rep. 485). The primary power to exercise the right of eminent domain rests with the legislature and when this power is exercised by a corporation upon which the legislature has conferred the right to use it, all the steps required by the legislature must be complied with. When this is done the decision of the corporation as to the extent, necessity and propriety of the taking, is as conclusive as when made by the legislature itself. *New York N. H. & H. R. Co.* v. *Long*, 69 Conn. 424 (37 Atl. Rep. 1070). Citing, *Town of Harwinton* v. *Catlin*, 19 Conn. 520; Cockcroft's Appeal, 60 Conn. 161 (22 Atl. Rep. 482); *People* v. *Smith*, 21 N. Y. 595; In re Fowler, 58 N. Y. 60; *Ash* v. *Cummings*, 50 N. H. 591; In re Mt. Washington Road Co., 35 N. H. 134; *National Docks Ry. Co.* v. *Central R. Co.* 32 N. J. Eq. 755; Cooley, Const. Lim. 660. Ala. Code, §§ 1391-1394; 1436, 1437; Const. art. 1, § 24; art. 14, § 7, construed and applied—condemnation of land for public road—constitutionality of statute. *Commissioners' Court* v. *Street*, 116 Ala. 28 (22 So. Rep. 629). A statute (Del. Act, April 29, 1891) which does not provide for a hearing by a property owner before an assessment for municipal improvements is levied, is not unconstitutional on the ground of a taking of property without due process of law. *English* v. *City of Wilmington*, 2 Marv. (Del.) 63 (37 Atl Rep. 158). Mass. Stat. 1895, ch. 442, §§ 1, 8, construed and applied—appropriation of the island of Muskeget by the town of Nantucket. *Whitman* v. *Inhabitants of Nantucket*, 169 Mass. 147 (47 N. E. Rep. 611). Mass. Stat. 1895, ch. 488, construed and applied—condemnation of land for water-works—constitutionality of statute and powers which may be exercised thereunder. *Burnett* v. *Commonwealth*, 169 Mass. 417 (48 N. E. Rep. 758).

Sec. 251. As to what is a public use. Under Mont. Const., art. 8, § 15, the use of water to irrigate the land of a particular individual or to work a mine thereon, is a public use. *Ellinghouse* v. *Taylor*, 19 Mont. 462 (48 Pac. Rep.

757). Citing, *Oury* v. *Goodwin*, Ariz. (26 Pac. Rep. 376); *Butte A. & P. Ry. Co.* v. *Montana U. Ry. Co.*, 16 Mont. 504 (41 Pac. Rep. 282; 50 Am. St. Rep. 508; 31 L. R. A. 298). Applying N. Dak. Rev. Codes, § 2947, subd. 8, which authorizes the appropriation of land when it is necessary for the maintenance and operation of a railroad, it is held that a legal necessity for the taking of private property for railroad purposes exists when it appears that such property is needed by the corporation to enable it to augment the safety of its road bed, at points where the road bed is unsafe at a particular time of year. *Bigelow* v. *Draper*, 6 N. Dak. 152 (69 N. W. Rep. 570). An order of the state board of transportation, under the provisions of the act of March 31, 1887, entitled "An act to regulate railroads and prevent unjust discrimination," etc., which requires a railroad company to surrender a portion of its right of way, for an elevator site, to a person or corporation engaged in the buying and shipping of grain, contemplates the taking of property for mere private use, within the prohibition of the United States constitution, and is accordingly, without authority and void. *Chicago, B. & Q. R. Co.* v. *State*, 50 Neb. 399 (69 N. W. Rep. 955). Following *State* v. *Missouri Pac. Ry. Co.*, 164 U. S. 403 (17 Sup. Ct. Rep. 130), reversing same case, 29 Neb. 550 (45 N. W. Rep. 785). See Ballards' Law of Real Property, Vol. V §§ 221–226. Minn. Gen. Stat. 1894, § 2750, authorizing a railroad corporation to alter its railway line, gives it power to condemn land for a new line. *Fletcher* v. *Chicago, St. P. M. & O. Ry. Co.*, 67 Minn. 339 (69 N. W. Rep. 1085).

Sec. 252. What property may be taken—Property already devoted to a public use. The right of a riparian owner to have a natural stream flow over his land is such property as may be condemned for railroad purposes. *Bigelow* v. *Draper*, 6 N. Dak. 152 (69 N. W. Rep. 570). The real estate of a married woman may be taken for a public use under the right of eminent domain, the statutory condemnation proceedings being a substitute for a conveyance from her with the formalities required by statute. *City of San Antonio* v. *Grandjean*, 91 Tex. 430 (41 S. W. Rep. 477). A recent statute of Indiana prohibits the location or construction

of "a railroad on any real estate held, used or occupied as a cemetery." Laws 1899, p. 15. Mass. Stat. 1889, ch. 144, construed and applied—appropriation by fire district—extent to which land may be taken for making repairs. *Bishop* v. *North Adams Fire Dist.*, 167 Mass. 364 (45 N. E. Rep. 925). Property held for a public use cannot be appropriated for another public use without express legislative authority. *Kansas City S. & G. Ry. Co.* v. *Vicksburg S. & P. R. Co.*, 49 La. 29 (21 So. Rep. 144).

Construing and applying Hill's Ann. Or. Laws, §§ 3255, 3256, 4061, it is held that a county cannot locate a road over land previously appropriated for a toll road without first paying the toll company the cost of constructing and repairing its road, after deducting the profits received by said company. *Little Nestucca Toll-Road Co.* v. *Tillamook Co.*, 31 Or. 1 (48 Pac. Rep. 465; 65 Am. St. Rep. 802). The court say: "The appropriation of land to a public use is an exercise of the sovereign power, which the state may delegate to a municipal or private corporation; and land already appropriated and used by its trustee under the authority delegated may be taken by legislative enactment for other public uses, in which case it is always presumed that the new use is of more importance and greater value to the public than the original appropriation. Mills Em. Dom. § 45; *Railroad Co.* v. *North*, 103 Ind. 486 (3 N. E. Rep. 144). It is a rule, however, of universal application, that the subsequent delegation of power to appropriate land which once has been appropriated must be in express terms, or must arise from necessary implication. *Boston Water Power Co.* v. *Boston & W. R. Corp.*, 23 Pick. 360; *Proprietors of Locks & Canals on Merrimac River* v. *City of Lowell*, 7 Gray 223; *Boston & M. R. R.* v. *Lowell & L. R. Co.*, 124 Mass. 368; *Providence & W. R. Co.* v. *Norwich & W. R. Co.*, 138 Mass. 277; *Hickok* v. *Hine*, 23 O. St. 523 (13 Am. Rep. 255); *Mayor, etc., of Jersey City* v. *Montclair Ry. Co.*, 35 N. J. L. 328; *New Jersey S. R. Co.* v. *Long Branch Com'rs*, 39 N. J. L. 28; In re City of Buffalo, 68 N. Y., 167. The right of the state to appropriate to a new use property which has already been subjected by a municipal or private corporation to a public burden must rest upon the authority of the state to change at pleasure its trustees and the object of its

trust; but when the trustee has an interest by reason of money expended in the purchase of the right of way, or in improvements made upon the property, under the power delegated, the state must provide a method of compensation for such interest before the property affected thereby can be appropriated to a new use."

Sec. 253. Taking of property already devoted to public use—Railroad property—Statutes construed. Where a railroad company has held property for many years without using it in connection with its business and it does not appear that it will be needed for such use in the future, such property may be appropriated for the use of another railroad company. *Kansas City & S. G. Ry. Co.* v. *Vicksburg S. & P. R. Co.*, 49 La. 29 (21 So. Rep. 144). In order to authorize a municipal corporation to take for the purpose of opening or extending streets, railroad property already devoted to a public use, the power must be conferred in express terms or by necessary implication. *City Council* v. *Georgia R. & Bank Co.*, 98 Ga. 161 (26 S. E. Rep. 499). The court say: "It has accordingly been held that 'under a general authority to lay out highways, a part of the right of way of a railroad cannot be taken longitudinally' (see *New Jersey Southern R. Co.* v. *Long Island Branch Com'rs*, 39 N. J. L. 28; *City of Bridgeport* v. *New York & N. H. R. Co.*, 36 Conn. 255; 4 Am. Rep. 68); 'nor can the way be laid through depot grounds' (see *St. Paul Union Depot Co.* v. *City of St. Paul*, 30 Minn. 359 (15 N. W. Rep. 684); *Milwaukee & St. P. R. Co.* v. *City of Faribault*, 23 Minn. 167; *Railroad Co.* v. *Williamson*, 91 N. Y. 552); 'nor through lands occupied by a railroad company for shops' (*Mayor, etc. of Atlanta* v. *Central Railroad & Banking Co.*, 53 Ga. 120)."

Under Ind. Rev. Stat. 1894, § 3623, a city council is given express power to condemn the right of way or other lands of a railroad company for street or alley purposes whether such lands be occupied and used or not. *City of Terre Haute* v. *Evansville & T. H. R. Co.*, 149 Ind. 174 (46 N. E. Rep. 77; 37 L. R. A. 189). Under Ia. Code, §§ 464–470, 1270, an incorporated town has authority to condemn a strip across a previously acquired railroad right of way for the purpose of

extending and connecting its streets. *City of Albia* v. *Chicago, B. & Q. R. Co.*, 102 Ia. 624 (71 N. W. Rep. 541). Applying La. Laws 1880, Act No. 124, and acts of congress 1866 and 1872, it is held that the right to construct a telegraph line over a railroad's right of way may be acquired by condemnation. *Postal Tel. C. Co.* v. *Morgan's Louisiana & T. R. R. & S. S. Co.*, 49 La. 58 (21 So. Rep. 183). For further construction of act of congress of July 24, 1866, and La. Laws 1880, Act No. 124, and discussion of the measure of damages, see *Postal Tel. Cable Co.* v. *Louisiana Western R. Co.*, 49 La. 1270 (22 So. Rep. 219).

Sec. 254. As to what is a taking. The laying out of a highway across a railroad is a taking of the company's property for public use and entitles it to compensation therefor. *Paterson, N. & N. Y. R. Co.* v. *City of Newark*, 61 N. J. L. 80 (38 Atl. Rep. 689). Construing and applying Cal. Const. art. 1, § 14, providing that "private property shall not be taken or damaged for public use without just compensation having been first made to, or paid into court for the owner," it is held that the legislature cannot authorize the construction of drains, for the benefit of certain lands, to collect surface water and convey and discharge it where it will injure the land of another not compensated therefor. Cal. Stat. 1895, p. 248, applied. *Rudel* v. *Los Angeles Co.*, 118 Cal. 281 (50 Pac. Rep. 400). Assessments for the expense of a drain, is not taking private property under the power of eminent domain, and a statute (Mich. Pub. Acts 1895, No. 217), is not unconstitutional because it makes no provision for notice and hearing on the question as to the public necessity of a drain to persons liable to assessment for the benefits but whose lands are not traversed by the ditch. *Roberts* v. *Smith*, 115 Mich. 5 (72 N. W. Rep. 1091). Applying Ga. Laws 1874, p. 131, § 60; Laws 1890–91, p. 446, it is held that the impairment of an abutting owner's right of ingress to and egress from her property, by the construction of a bridge by the city of Atlanta in one of its streets is not a taking of property within the meaning of the constitution. *Hurt* v. *City of Atlanta*, 100 Ga. 274 (28 S. E. Rep. 65).

Sec. 255. As to what is a taking—Damage to leasehold estate. Construing and applying Ga. Const. art. 1, § 3, which prohibits the taking and damaging of private property for public purposes without just and adequate compensation being first made, it is held that where according to the plan of a proposed public improvement, its completion must inevitably result in the total exclusion of a leaseholder from his premises, or render the same so inconvenient as to render it valueless to him for the purposes for which it is leased, he may abandon his lease, and vacate the premises, whenever, in the execution of the projected plan of construction, the work has so far progressed as virtually to destroy his lease, and thus prevent the enjoyment by him of his estate, and thereupon may sue for and recover from the city the diminution, during the remainder of his unexpired term, in the market value of the premises for rent, caused by the construction of such improvement. *Pause* v. *City of Atlanta*, 98 Ga. 92 (26 S. E. Rep. 489; 58 Am.St. Rep. 290). The court say: "The word 'damage' embraces more than the mere physical taking of property, and is not restricted to cases where the owner is entitled to recover as for a tort at common law. *Reardon* v. *City and County of San Francisco*, 66 Cal. 492 (6 Pac. Rep. 317; 56 Am. Rep. 109). It seems that this language is intended to cover all cases in which, even in the proper prosecution of a public work or purpose, the right of a person in property, or the property itself, is in a pecuniary way injuriously affected. *Railway Co.* v. *Fuller*, 68 Tex. 467; *Gottschalk* v. *Railroad Co.*, 14 Neb. 550 (16 N. W. Rep. 475; 17 N. W. Rep. 120); *Railroad Co.* v. *Williamson*, 45 Ark. 429; *City of Atlanta* v. *Green*, 67 Ga. 386; *City of Denver* v. *Bayer*, 7 Colo. 113 (2 Pac. Rep. 6); *Railroad Co.* v. *Nestor*, 10 Colo. 403 (15 Pac. Rep. 714); *Mason* v. *Bridge Co.*, 17 W. Va. 396. The damages, therefore, that an individual may recover for injuries to his property need not necessarily be caused by acts amounting to a trespass, or by an actual physical invasion of his real estate, but if his property be depreciated in value by his being deprived of some right of user or enjoyment growing out of and appurtenant to his estate as the direct consequence of the construction and use of

any public improvement, his right of action is complete, and he may recover to the extent of the injury sustained. *Railroad Co.* v. *Ayres*, 106 Ill. 511; *City of East St. Louis* v. *O'Flynn*, 19 Ill. App. 66."

Sec. 256. Additional servitude. Laying water pipes in a street does not constitute an additional servitude, *Bishop* v. *North Adams Fire Dist.*, 167 Mass. 364 (45 N. E. Rep. 925); nor does the construction of an elevated railroad, *Doane* v. *Lake St. El. R. Co.*, 165 Ill. 510 (46 N. E. Rep. 520; 56 Am. St. Rep. 265; 36 L. R. A. 97); or the conversion of a single track horse car street railway into a double track electric street railway, made under legislative and municipal authority. *Reid* v. *Norfolk City R. Co.*, 94 Va. 117 (26 S. E. Rep. 428; 36 L. R. A. 274). An electric street railway laid at grade is not an additional servitude. *Placke* v. *Union Depot R. Co.*, 140 Mo. 634 (41 S. W. Rep. 915). Citing *Dean* v. *Railway Co.*, 98 Mich. 380 (58 N. W. Rep. 396); *Koch* v *Railway Co.*, 75 Md. 222 (28 Atl. Rep. 468; 15 L. R. A. 377); *Lockhart* v. *Railway Co.*, 139 Pa. St. 419 (21 Atl. Rep. 26); *Chicago, B. & Q. R. Co.* v. *West Chicago St. Ry. Co.*, 156 Ill. 255 (40 N. E. Rep. 1008; 29 L. R. A. 485); *Taggart* v. *Railway Co.*, 16 R. I. 668 (19 Atl. Rep. 326; 7 L. R. A. 205). Constructing an electric street railway in a highway does not subject it to a new servitude, *Canastota Knife Co.* v. *Newington Tramway Co.*, 69 Conn. 146 (36 Atl. Rep. 1107); but an electric railway in a village street, which forms part of a connecting line between cities for transporting merchandise, personal baggage, mail and express matter, as well as passengers, constitutes an additional servitude. *Chicago & N. W. Ry. Co.* v. *Milwaukee, R. & K. Elec. Ry. Co.*, 95 Wis. 561 (70 N. W. Rep. 678; 60 Am. St. Rep. 136; 37 L. R. A. 856). The use of a highway for the construction of a toll road thereon, does not constitute an additional burden. *State* v. *Hannibal & R. C. Gravel-Road Co.*, 138 Mo. 332 (39 S. W. Rep. 910; 36 L. R. A. 457). Citing, *Carter* v. *Clark*, 89 Ind. 238; *Road Co.* v. *Cane*, 2 O. St. 419; *Turnpike Co.* v. *Bishop*, 11 Vt. 198; *Callison* v. *Hedrick*, 15 Grat. 244; *Douglas* v. *Road Co.*, 22 Md. 219 (85 Am. Dec. 647); *Wright* v. *Carter*, 27 N. J. L. 76; *Walker* v. *Caywood*, 31 N. Y. 51.

In Kentucky it is held that the construction of a railroad in a city street does not constitute an additional burden. *Dulaney* v. *Louisville & N. R. Co.*, 100 Ky. 628 (38 S. W. Rep. 1050). The erection of a telephone line upon a right of way condemned for a water pipe line is an additional servitude. *City of Spokane* v. *Colby*, 16 Wash. 610 (48 Pac. Rep. 248).

Sec. 257. Compensation for property taken—Bond for damages as a substitute. A county which takes the lands of a citizen for public purposes without proper condemnation proceedings, is liable for damages resulting on account thereof. *County of Douglas* v. *Taylor*, 50 Neb. 585 (70 N. W. Rep. 27). A statute (Tenn. Acts 1883, ch. 152), which authorizes the use of all streams by the public for floating logs on their giving security to protect the owners of mill dams from damage, is unconstitutional as to nonnavigable streams, as it authorizes the taking of private property without compensation. *Allison* v. *Davidson*, Tenn. (39 S. W. Rep. 905). The court say: "If a stream, however, is in fact nonnavigable, it is not a public way; and the writer is of the opinion that it is not competent for the legislature, by any enactment, to make it one, and thus to take private property for public use without compensation. *The City of Grand Rapids* v. *Powers*, 89 Mich. 94 (50 N. W. Rep. 661; 14 L. R. A. 498); *People* v. *Elk River Mill & Lumber Co.*, 107 Cal. 221 (40 Pac. Rep. 531; 48 Am. St. Rep. 125); *Morgan* v. *King*, 35 N. Y. 453 (91 Am. Dec. 58); *Irwin* v. *Brown*, Tenn. (12 S. W. Rep. 340). And the requirement of a bond for any damages that may be done to mill owners rightfully having dams across streams by the floatage of logs is no compliance with the constitution, prohibiting the taking of private property for the use of the public except upon the payment of just compensation. The constitutional provision is too important, as well as too plain in its purpose, to be overturned and practically abolished by the giving of bond to be responsible at the end of a lawsuit for damages for wrongfully or negligently depriving the citizen of the full beneficial use of his property. The constitution forbids the taking of private property except for public use, and that upon the payment of a fair and just compensation for it. It does not

authorize the 'taking of the use' of property for occasional periods when any other citizen desires to use it, upon his obligating himself to pay such damages or injury as the courts may award or adjudge that his use has done to it. No one, we presume, would contend that it was competent for the legislature to enact a law authorizing anybody who wanted to ride and haul his products across the farm of the citizen by paying or obligating himself to pay the damage caused thereby. The right to the beds of nonnavigable streams, and to the uninterrupted flow of their waters, are as much property rights of the riparian proprietors as is the ownership of a farm; and, if the latter is protected by the constitution, the former are, and to the same extent. To hold otherwise, it seems to us, would be to permit the erection of a legislative battering ram, to batter down and demolish utterly one of the most sacred bulwarks of the constitution, designed to protect rights of private property."

Sec. 258. Proceedings to condemn land—Complaint or petition. Under Conn. Gen. Stat. § 3464, in proceedings to condemn land by a railroad, the averment that "it cannot obtain it by agreement with the parties interested therein" is a necessary one, and must be proved before the appraisers can be appointed. *New York, N. H. & H. R. Co.* v. *Long*, 69 Conn. 424 (37 Atl. Rep. 1070). A petition which alleges inability to agree with the owners of the premises is sufficient without alleging a failure to agree with one holding a vendor's lien on the property. *Thomas* v. *St. Louis, B. & S. Ry. Co.*, 164 Ill. 634 (46 N. E. Rep. 8). If a petition for condemnation misstates the facts, so that one statute would be applicable to the facts as stated and a different statute to the real facts, it is erroneous. *Glazier* v. *New Jersey & N. Y. R. Co.*, 60 N. J. L. 353 (37 Atl. Rep. 614). It is not necessary, in a petition to condemn land for railway purposes to specify the particular public use to which each tract of land is to be put. A general allegation of the purposes for which it is sought to acquire the land described in the petition is sufficient, for the landowner's damages are to be assessed upon the hypothesis that the land to be acquired is liable to be appropriated for any or all of the public uses stated in the petition

at any time when the railway company deems such use necessary or expedient. *Fletcher* v. *Chicago, St. P. M. & O. Ry Co.*, 67 Minn. 389 (69 N. W. Rep. 1085). One whose land is sufficiently described by the petition, cannot object to its sufficiency on the ground that the lands of others are not separately described and that his interest in the land sought to be condemned, is not stated. *City of Pontiac* v. *Lull*, 111 Mich. 509 (69 N. W. Rep. 1110). Cal. Pol. Code, § 2090, applied —sufficiency of complaint in proceedings to condemn land for a private way. *Sonoma Co.* v. *Crozier*, 118 Cal. 680 (50 Pac. Rep. 845). Ill. Rev. Stat. ch. 24, art. 9, § 5, construed and applied—sufficiency of petition where the city seeks to condemn the land of a railroad for a street. *Chicago & A. R. Co.* v. *City of Pontiac*, 169 Ill. 155 (48 N. E. Rep. 485).

Sec. 259. Proceedings to condemn land—Amendments. The petitioner may amend his petition with the leave of the court, so as to strike therefrom land, as to which he does not wish to continue the proceedings, the owner of such land not objecting. *Fletcher* v. *Chicago, St. P. M. & O. Ry. Co.*, 67 Minn. 389 (69 N. W. Rep. 1085). Applying N. Dak. Rev. Codes, § 5962, which requires that the complaint must contain the name of the corporation, association, commission, or person in charge of the public use for which the property is sought, it is held that an action to condemn property for railroad purposes should be brought in the name of the company, despite the fact that its property is in the hands of receivers appointed in foreclosure proceedings, who are operating the road; that such action having been brought in the name of the receivers it was not error for the court, after the verdict fixing the compensation to be paid for the taking of the property condemned, to amend the pleadings and all proceedings by inserting the name of the corporation on its own motion; and that as the action was brought by and in the names of the receivers on behalf of the corporation it was not necessary to dismiss the action and institute a new suit as would be necessary where the sole plaintiff, who sues in his own behalf, has no interest in the cause of action, the right to sue being in another. *Bigelow* v. *Draper*, 6 N. Dak. 152 (69 N. W. Rep. 570). Citing, *State* v. *Baker*, 38 Wis. 71;

Buckland v. *Green*, 133 Mass. 421; *Winch* v. *Hosmer*, 122 Mass. 438; *Costelo* v. *Crowell*, 134 Mass. 280; *Wood* v. *Circuit Judge*, 84 Mich. 521 (47 N. W. Rep. 1103); *Morford* v. *Diffenbacker*, 54 Mich. 593 (20 N. W. Rep. 600); *Kinney* v. *Harret*, 46 Mich. 87 (8 N. W. Rep. 708); *Wellman* v. *Dismukes*, 42 Mo. 101; *Suber* v. *Chandler*, 28 S. C. 382. See, also, *Weaver* v. *Young*, 37 Kan. 70 (14 Pac. Rep. 458); *Miles* v. *Strong*, 60 Conn. 393 (22 Atl, Rep. 959); *Denton* v. *Stephens*, 32 Miss. 194; *Stratton* v. *Taylor*, 32 Miss. 201; *Lombard* v. *Morse*, 155 Mass. 136 (29 N. E. Rep. 205; 14 L. R. A. 273); *Wilson* v. *Welch*, 157 Mass. 77 (31 N. E. Rep. 712); *Insurance Co.* v. *Mueller*, 77 Ill. 22; *Lake Erie & W. R. Co.* v. *Town of Boswell*, 137 Ind. 336 (36 N. E. Rep. 1103); *Henry* v. *Sansom*, 2 Tex. Civ. App. 150 (21 S. W. Rep. 71); *Wood* v. *Baker*, 38 Wis. 71; *Railroad Co.* v. *Bedell*, 88 Ga. 591 (15 S. E. Rep. 676); *Estes* v. *Thompson*, 90 Ga. 698 (17 S. E. Rep. 98); 5 Enc. Pl. & Prac. pp. 466, 468, 538, and notes.

Sec. 260. Proceedings to condemn land—Right to jury trial. Construing N. Dak. Rev. Codes, § 5955, which requires that "compensation shall in all cases be ascertained by a jury unless the jury is waived," it is held that all issues in a condemnation action, except the issue of compensation, are triable by the court without a jury. *Bigelow* v. *Draper*, 6 N. Dak. 152 (69 N. W. Rep. 570). The court say: "The owner of property taken for public use has no constitutional right to submit to a jury any question arising in the proceedings, unless the constitution specifically so declares. The guaranties of the right to a trial by jury, and that property shall not be taken without due process of law, found in the various state constitutions, do not confer upon the citizen the right to a jury trial in such cases. Cooley, Const. Lim. 563, side paging; *People* v. *Smith*, 21 N. Y. 595; *Ames* v. *Railway Co.*, 21 Minn. 241–291; *Manufacturing Co.* v. *Garland*, 25 Fed. Rep. 521; *Koppikus* v. *Commissioners*, 16 Cal. 248; Ex parte Reynolds, 52 Ark. 330 (12 S. W. Rep. 570); *Beekman* v. *Saratoga R. R. Co.*, 3 Paige Ch. 45 (22 Am. Dec. 679); *United States* v. *Jones*, 109 U. S. 519 (3 Sup. Ct. Rep. 346); *Ligat* v. *Com.*, 19 Pa. St. 456–460; *Railroad Co.* v. *Trout*, 32 Ark. 17; *Johnson* v. *Railroad Co.*, 23 Ill. 202.

Sec. 261. Proceedings to condemn land—View of premises by jury. While a jury which has taken a view of the premises which are to be appropriated and which will be damaged by the proposed appropriation, may weigh the evidence as to their value and the damages, in the light of what they have seen, yet the verdict must be within the limits of such evidence and it cannot rest alone upon their own judgment, based upon mere inspection of the property. *Bigelow* v. *Draper*, 6 N. Dak. 152 (69 N. W. Rep. 570). An award of damages will not be disturbed when the evidence is conflicting and the jury viewed the premises. *Chicago, B. & Q. R. Co.* v. *City of Naperville*, 166 Ill. 87 (47 N. E. Rep. 784); *Lyon* v. *Hammond & B. I. R. Co.*, 167 Ill. 527 (47 N. E. Rep. 775); *Chicago & A. R. Co.* v. *City of Pontiac*, 169 Ill. 155 (48 N. E. Rep. 485); *Davis* v. *Northwestern El. Ry. Co.*, 170 Ill. 595 (48 N. E. Rep. 1058); *Boecker* v. *City of Naperville*, 166 Ill. 151 (48 N. E. Rep. 1061).

Sec. 262. Proceedings to condemn land—Recovery of costs and attorney's fees. A judgment for compensation carries with it the costs of the action. *Dickson* v. *Epling*, 170 Ill. 329 (48 N. E. Rep. 1001). In Missouri it is held that upon the discontinuance of proceedings to condemn land for the use of a railroad, the landowner is entitled to payment by the company of all the costs of the case including counsel fees incurred in maintaining a defense denying the power of the corporation to condemn land. *St. Louis R. Co.* v. *Southern Ry. Co.*, 138 Mo. 591 (39 S. W. Rep. 471). Following, *Railroad Co.* v. *Lackland*, 25 Mo. 515.

Sec. 263. Proceedings to condemn land—Statutes construed. Conn. Gen. Stat. § 3460 construed and applied —sufficiency of expression of an intention by a railroad to condemn land. *New York, N. H. & H. R. Co.* v. *Long*, 69 Conn. 424 (37 Atl. Rep. 1070). Under § 18 of Illinois Eminent Domain Act, a railroad company may enter upon the use of the land sought to be condemned for its right of way pending an appeal from condemnation proceedings brought for that purpose, by giving bond to pay such damages as may be finally assessed. *Johnson* v. *Metropolitan W. S. El. R. Co.*,

160 Ill. 477 (45 N. E. Rep. 680). For further construction of this statute, see *Davis* v. *Northwestern El. Ry. Co.*, 170 Ill. 595 (48 N. E. Rep. 1058). Ill. Rev. Stat. 1874, ch. 47, § 5, construed and applied—granting separate trial to parties interested. *Braun* v. *Metropolitan West Side El. R. Co.*, 166 Ill. 484 (46 N. E. Rep. 974). Ill. Laws 1891, p. 80, construed and applied—condemnation proceedings by incorporated city—dismissal for failure to complete and pay damages. *Pearce* v. *City of Chicago*, 169 Ill. 631 (48 N. E. Rep. 330). Ill. Rev. Stat. ch. 47, § 10, construed and applied—proceedings to condemn lands for the use of the Sanitary District of Chicago—conclusiveness of judgment. *Allen* v. *Haley*, 169 Ill. 532 (48 N. E. Rep. 478). Iowa Code 1873, § 1241; Acts 20th Gen. Assem. ch. 190, § 1, construed and applied—condemnation of additional depot grounds. *Crandall* v. *Des Moines N. & W. R. Co.*, 103 Ia. 684 (72 N. W. Rep. 778). Ia. Code, §§ 1255, 1256, construed and applied—effect upon appeal, of the landowner's acceptance of the award. *Burns* v. *Chicago, Ft. M. & D. M. Ry. Co.*, 102 Ia. 7 (70 N. W. Rep. 728). Ia. Code, §§ 1825, 1826, construed and applied—condemnation of school house site. *Salisbury* v. *School Dist.*, 101 Ia. 556 (70 N. W. Rep. 706). Ky. Stat. 1894, §§ 835–840, 3668, construed and applied—condemnation of property for municipal purposes—appeal to circuit court—trial by jury. *Town of Walton* v. *Norman*, Ky. (42 S. W. Rep. 1146). Mo. Rev. Stat. 1889, § 5974; pp. 2119–2122, construed and applied—allowing interest upon awarded damages. *Martin* v. *City of St. Louis*, 139 Mo. 246 (41 S. W. Rep. 231). N. J. Gen. Stat., Vol. 2, p. 1386, construed and applied —appointment of commissioners to condemn land—fixing a day for their report. *Bray* v. *Ocean City R. Co.*, 60 N. J. L. 91 (36 Atl. Rep. 879).

Sec. 264. Proceedings to condemn land.—Miscellaneous notes. A landowner cannot impose as a defense the plea that the petitioner is improperly exercising its railroad franchise. *Thomas* v. *St. Louis, B. & S. Ry. Co.*, 164 Ill. 634 (46 N. E. Rep. 8). Where, in the same complaint, a landowner seeks to enjoin the wrongful taking of his land for a public use and recover compensation for injuries on account of

such taking and an injunction is granted him, which,upon the consent of the defendant is made final, he cannot also recover compensation for the taking of his property which is prohibited by the injunction. *MacMurray-Judge Arch'l I. Co.* v. *City of St. Louis*, 188 Mo. 608 (89 S. W. Rep. 467). The determination of the amount of compensation is a judicial question. *New York, N. H. & H. R. Co.* v. *Long*, 69 Conn. 424 (37 Atl. Rep, 1070). A railroad company does not lose its right to condemn a right of way across a tract of land, because it formerly owned the land and lost its title by foreclosure of a mortgage. *Thomas* v. *St. Louis, B. & S. Ry. Co.*, 164 Ill. 634 (46 N. E. Rep. 8). In Illinois it is held that the consent of a city is not a necessary prerequisite to the exercise of the statutory right to condemn private property within a city for right of way of a railroad company, organized under the laws of that state, and authorized by its charter to build and operate its road to such city. *Ligare* v. *Chicago, M. & N. R. Co.*, 166 Ill. 249 (46 N. E. Rep. 808). Under the statutes of Kansas, it is held that the report of commissioners agreed upon and signed by all three, but not filed until after the resignation of one of such commissioners and the substitution in his place of another, who did not join in the making of such report or take any part in the condemnation proceedings, is invalid. *Leavenworth, N. & S. Ry. Co.* v. *Meyer*, 58 Kan. 805 (49 Pac. Rep. 89). A railroad company which has entered upon another's land and instituted proceedings to condemn it, will not be allowed to limit the scope of such condemnation proceedings to that part of the land only to which such owner can establish a perfect title. *Kansas City S. B. R. Co.* v. *Norcross*, 137 Mo. 415 (38 S. W. Rep. 299). Giving an erroneous instruction as to the rule of damages is not cured by the announcement of the correct rule in another instruction. *Chicago B. & Q. R. Co.* v. *City of Naperville*, 166 Ill. 87 (47 N. E. Rep. 734).

Sec. 265. Proceedings to condemn land—Evidence. In condemning land for a railroad right of way it is not competent to prove what has been paid for a right of way through other lands. *Lyon* v. *Hammond & B. I. R. Co.*, 167 Ill. 527 (47 N. E. Rep. 775) Citing, *Peoria Gaslight & Coke Co.* v.

Peoria Terminal Ry. Co., 146 Ill. 372 (34 N. E. Rep. 550); *Kelliher* v. *Miller*, 97 Mass. 71; Lewis, Em. Dom. § 447. But the admissibility of an opinion as to the value of land, based in part on a recent sale of neighboring land, is not affected by the fact that such land was subsequently purchased by the railroad company from the original purchaser as a part of its right of way, it not appearing that the original vendor knew for what purpose the land was bought. *St. Louis Terminal Ry. Co.* v. *Hieger*, 139 Mo. 315 (40 S. W. Rep. 947). For particular case as to the competency of a witness to testify as to the value of land taken, see *Kansas City, S. B. R. Co.* v. *Norcross*, 137 Mo. 415 (38 S. W. Rep. 299). In determining the damages to a brick plant on account of the condemnation of a railroad right of way across the land on which it is situated, a witness may state the entire value of the plant before being interfered with by the railroad company and the per cent. of its depreciation. *Kansas City, S. B. R. Co.* v. *Norcross*, 137 Mo. 415 (38 S. W. Rep. 299). It is not substantial error to admit testimony showing the plans of the landowner for the future use of the ground over which a railroad right of way is condemned, where the estimates of damages are confined to the market value of the land immediately before and immediately after the appropriation of the right of way, and where no evidence is offered of future profits or values, based on contemplated improvements. *Union Terminal R. Co.* v. *Peet Bros. Mfg. Co.*, 58 Kan. 197 (48 Pac. Rep. 860).

Sec. 266. Failure of condemning party to pay compensation—Lien and remedies of landowner. Construing and applying Tenn. Const. art. 1, § 21, providing that no property shall be taken or applied to public use without the consent of the owner or his representatives or without just compensation being made therefor, it is held that where a railroad company acquired a right of way under the exercise of the right of eminent domain without payment of compensation, the landowner's claim for compensation is a lien on the whole line of road and not merely on the particular piece of ground taken; that where the company is insolvent injunction is not his exclusive remedy, but several of such right of way claimants may have a receiver appointed and procure a sale of the

company's property and have the proceeds appropriated first to the payment of their claims. A court appointing the receiver cannot authorize the issue of receiver's certificates by him which have priority over such right of way claims. *Crosby* v. *Morrison & C. G. R. Co.* Tenn. (42 S. W. Rep. 507).

Sec. 267. Measure of damages—Elements considered. The value of the land for the use to which it is being put at the time of the condemnation proceedings and not its value for some supposed future use, should be considered. *Kansas City S. B. R. Co.* v. *Norcross*, 137 Mo. 415 (38 S. W. Rep. 299). In determining the value of property taken it is proper to consider the different uses to which it is adapted. *St. Louis Terminal Ry. Co.* v. *Hieger*, 139 Mo. 315 (40 S. W. Rep 947). Speculative damages are not to be allowed, and in determining the value of the land taken, it is not proper to consider what it may be worth at some remote and future time, when it might be used for some other purpose; but it is proper to consider a use to which the land could be put in the immediate future so as to increase its value, such as platting it into lots and selling it as such. *Alexian Bros.* v. *City of Oshkosh*, 95 Wis. 221 (70 N. W. Rep. 162). Where the real estate involved consists of city lots, so located as to be mainly suitable for residence purposes, but to make them entirely fit for "residence lots" it would be necessary to fill them with earth to a certain grade, it is held that the amount of expense which would be necessarily incurred in such filling, may be considered. *Farwell* v. *Chicago, R. I. & P. R. Co.*, 52 Neb. 614 (72 N. W. Rep. 1036). The owner is not entitled to recover the special value of the property to the condemning party. He is entitled to the actual cash market value of the property for the best and most valuable use to which it is adapted, provided such use enters into and affects its market value. The "market value" is the price at which the owner, if desirous of selling, would sell the property for, and what reasonable persons, desirious of purchasing, would have paid for it. *Ligare* v. *Chicago, M. N. & R. Co.*, 166 Ill. 249 (46 N. E. Rep. 803). Where the condemnation of a portion of property occupied for

business purposes is sought evidence of the damage to the owner on account of a removal of his business cannot be considered unless it is made to appear that such appropriation will necessitate the removal of his business. *Braun* v. *Metropolitan West Side El. R. Co.*, 166 Ill. 484 (46 N. E. Rep. 974). The destruction of conveniences especially adapted to the business of the injured party, cannot be regarded as an element of damage any more than the loss of good will. *Williams* v. *Commonwealth*, 168 Mass. 864 (47 N. E. Rep. 115). Destruction of fixtures erected by a life tenant should be considered in estimating the value of the land, and damages on account thereof belong to the landowner. Mass. Pub. Stat. ch. 49, § 27, applied. *Williams* v. *Commonwealth*, 168 Mass. 864 (47 N. E. Rep. 115). For particular elements which may be considered where land is appropriated for the construction of a sewer, see *Butchers' Slaughtering & M. Ass'n* v. *Commonwealth*, 169 Mass. 108 (47 N. E. Rep. 599).

Sec. 268. Measure of damages—Benefits considered. In condemning lands for a right of way for a railroad, it is held that the benefits to be derived by the owner from or in consequence of its construction, can not be considered. *Glazier* v. *New Jersey & N. Y. R. Co.*, 60 N. J. L. 353 (37 Atl. Rep. 614). Benefits may be considered as against prospective injury to lands not taken. *Braun* v. *Metropolitan West Side El. R. Co.*, 166 Ill. 484 (46 N. E. Rep. 974). Only special benefits to property can be set off against damages inflicted upon it. *Lake Roland El. Ry. Co.* v. *Frick*, 86 Md. 259 (37 Atl. Rep. 650). In Georgia it is held that in determining the right of an abutting owner to recover damages on account of the construction of a municipal improvement, the market value test is the proper one to apply, and if the improvement increases the market value of the premises more than the amount it damages them, there can be no recovery. *Hurt* v. *City of Atlanta*, 100 Ga. 274 (28 S. E. Rep. 65). Under the statute of Illinois damages cannot be recovered for injury to property not taken unless its market value has been lessened, and in determining this question, benefits to the property may be considered although they

are of a general nature and operate to increase the value of other property in the same vicinity. *Metropolitan West Side El. R. Co.* v. *White*, 166 Ill. 375 (46 N. E. Rep. 978). Following *Metropolitan West Side El. Ry. Co.*, v. *Stickney*, 150 Ill. 362 (37 N. E. Rep. 1098; 26 L. R. A. 778). An instruction that the benefits shall not be considered unless they actually increase the market value of the property not taken is erroneous. *Lyon* v. *Hammond & B. I. R. Co.*, 167 Ill. 527 (47 N. E. Rep. 775). In assessing damages to land on account of the construction of a sewer through it, it is proper to consider special benefits accruing to it on account of drainage, even though other lands receive similar benefits. Benefits to the land for the use for which it is adapted may be considered, but it is improper to consider benefits to the particular business of the owner. *Butchers' Slaughtering & M. Ass'n* v. *Commonwealth*, 169 Mass. 103 (47 N. E. Rep. 599). In assessing damages for the land appropriated for a highway, it is not proper to make a reduction on account of the increase of the value of wood and timber on the premises which it is claimed will result from the opening of the highway. *Woodman* v. *Town of Northwood*, 67 N. H. 307 (36 Atl. Rep. 255).

Sec. 269. Meaures of damages—Taking of leasehold estate. Where the leased premises are rendered valueless for the purposes for which the lessee has them leased, he is entitled to recover the diminution in value of the remainder of his unexpired term, but in such case the profits of the business are not recoverable nor the cost of fixtures and improvements which he has removed, but the increased value of the premises for rent in consequence of the putting in of fixtnres may properly be considered in computing damages to the leasehold estate. *Pause* v. *City of Atlanta*, 98 Ga. 92 (26 S. E. Rep. 489; 58 Am. St. Rep. 290).

Sec. 270. Measure of damages—Condemnation of land for railroad right of way. In assessing the damages to two tracts of land owned by a manufacturing company, separated by a cattle drive sixteen feet wide, over and under which the landowners had a right of way, with full privilege to bridge over or tunnel under, as they might see fit, damages may be

awarded to both tracts, though the right of way appropriated is taken wholly from one of them. *Union Terminal R. Co.* v. *Peet Bros. Mfg. Co.*, 58 Kan. 197 (48 Pac. Rep. 860). Where the lots described in a railroad company's petition for condemnation for a right of way are but a part of an entire parcel of land, used for a general purpose by the defendants, the inquiry as to damages is not limited to the land described in the petition, but embraces all damages that defendants have sustained to their entire body of land through which the road runs. *Kansas City S. B. R. Co.* v. *Norcross*, 137 Mo. 415 (38 S. W. Rep. 299). For the land taken, the measure of damages is the market value ;and for injuries to property not taken, the measure of damages is the market value after the taking and construction of the road as compared with the value before. *Davis* v. *Northwestern El. Ry. Co.*, 170 Ill. 595 (48 N. E. Rep. 1058). A railroad company may show that inconveniences to the landowner which might otherwise properly be considered as elements of damage, will be overcome by its proposed method of constructing its road, and stipulations of this character made by the company run with the land. *Lyon* v. *Hammond & B. I. R. Co.*, 167 Ill. 527 (47 N. E. Rep. 775). Particular award of damages held not excessive. *Maysville &. B. S. R. Co.* v. *Trustees of Dover Christian Church*, Ky. (39 S. W. Rep. 35).

Sec. 271. Measure of damages—Condemnation of railroad lands to other public use. Where lands of a railroad company are taken for a street, the measure of compensation is the amount of decrease in the value of the use for railroad purposes caused by the use for the purposes of a street, such use for the purpose of a street being exercised jointly with the use of the company for railroad purposes. *Chicago B. & Q. R. Co.* v. *City of Naperville*, 166 Ill. 87 (47 N. E. Rep. 734); *Chicago & A. R. Co.* v. *City of Pontiac*, 169 Ill. 155 (48 N. E. Rep. 485); *Illinois Cent. R. Co.* v. *City of Chicago*, 169 Ill. 329 (48 N. E. Rep. 492). The company is not entitled to recover the expense which will be necessitated on account of its complying with police regulations as to street crossings. *Chicago B. & Q. R. Co.* v. *City of Naperville*, 166 Ill. 87 (47 N. E. Rep. 734); *Chicago & A.*

R. Co. v. *City of Pontiac*, 169 Ill. 155 (48 N. E. Rep. 485); *Chicago, M. & St. P. Ry. Co.* v. *City of Milwaukee*, 97 Wis. 418 (72 N. W. Rep. 1118). The same is held in Texas. Applying Rev. Stat. 1895, art. 4435. *Gulf, C. & S. F. Ry. Co.* v. *Milam Co.*, 90 Tex. 355 (38 S. W. Rep. 747). But in New Jersey it is held that compensation for a highway crossing over the right of way of a railroad includes the making good to the company the moneys expended by it in erecting, maintaining, and operating gates at the crossing, provided such gates are necessary for the proper protection of the public and for the safe operation of the railroad, although the erection of such gates was required by a city ordinance. *Paterson, N. & N. Y. R. Co.* v. *City of Newark*, 61 N. J. L. 80 (38 Atl. Rep. 689).

Where a party seeking to condemn a right to cross a railroad fails to define how it will cross such right of way, but seeks to condemn the privilege of crossing generally, the damages will be assessed after that manner of crossing. which will be most injurious to the company's interests. *Paterson, N. & N. Y. R. Co.* v. *City of Newark*, 61 N. J. 80 (38 Atl. Rep. 689). Where lands of a railroad company are condemned by a city for the purposes of a street, under Ind. Rev. Stat. 1894, §§ 3623–3657, the company is entitled to recover all damages sustained and not merely the value of the real estate taken. *City of Terre Haute* v. *Evansville & T. H. R. Co.*, 149 Ind. 174 (46 N. E. Rep. 77; 37 L. R. A. 189). It is proper to consider the value of the land for the special use to which it is applied, but its adaptation to a possible future use for which the company is not shown to have any intention of using it, cannot be considered. *Illinois Cent. R. Co.* v. *Village of Lostant*, 167 Ill. 85 (47 N. E. Rep. 62); *Illinois Cent. R. Co.* v. *City of Chicago*, 169 Ill. 329 (48 N. E. Rep. 492). Nor can the company be allowed for the loss of prospective profits which it expected to realize by shipping grain from an elevator building for another and which may be affected by the street cutting off the approaches to the elevator. *Illinois Cent. Co.* v. *Village of Lostant*, 167 Ill. 85 (47 N. E. Rep. 62.) Where the right of way or depot grounds of a railroad company are taken for a public street, it is error to admit evidence of the

value of the ground for the use of a street subject to the rights of the railroad company. In such a case the measure of compensation is the amount of decrease in the value of the use for railroad purposes which would be caused by the use for the purposes of the street. Where damages are claimed for injury to property not taken, the railroad company is entitled to be recompensed for the increased cost of transacting its business occasioned by the opening of the street, but it cannot recover the increased expense which it will incur on account of complying with measures for the preservation of the public safety. *Chicago B. & Q. R. Co.* v. *City of Naperville*, 166 Ill. 87 (47 N. E. Rep. 734). For consideration of particular questions of evidence and instructions in proceedings to condemn land of a railroad for street purposes, see *Chicago & A. R. Co.* v. *City of Pontiac*, 169 Ill. 155 (48 N. E. Rep. 485).

Sec. 272. Who entitled to receive the damages—Rights of mortgagor and mortgagee—Lessor and lessee. Where land is condemned by a county for a public use, the holder of the legal title is entitled to receive the damages, and his right cannot be defeated by a release of damages executed to the county by one, for whom it claims, the holder of the legal title holds the land in trust. *Propst* v. *Cass Co.*, 51 Neb. 736 (71 N. W. Rep. 748). Where mortgaged premises have been condemned and the damages therefor paid to the county treasurer, the mortgagor may maintain a bill to determine the proper application of the fund. *Keller* v. *Bading*, 169 Ill. 152 (48 N. E. Rep. 436; 61 Am. St. Rep. 159). As to who is entitled to damages when mortgaged land is condemned, see *Patterson* v. *City of Binghampton*, 154 N. Y. 891 (48 N. E. Rep. 739). For particular case determining the rights of mortgagees and execution creditors in an award given for the condemnation of land, see *Commercial Nat. Bank* v. *Johnson*, 16 Wash. 536 (48 Pac. Rep. 267). Where, after proceedings have been brought to condemn leased premises, the landlord makes a conveyance in consideration of the payment of an agreed sum, his tenant cannot claim any portion thereof where he has made no claim for damages. Mass. Pub. Stat. ch. 49, §§ 18, 19, as amended by Stat. 1888, ch.

258, applied. *Uhland* v. *Schupbach*, 168 Mass. 430 (47 N. E Rep. 118).

Sec. 273. Priority of award of damages — Lien of judgment. The priority of a landowner's claim for damages, awarded to him in condemnation proceedings by a railroad company to obtain a right of way, may be waived by his failure for several years to assert any claim to damages, during which time the company suffers itself to be dispossessed of the right of way by another company, to which the owner gives a warranty deed to the land. Ind. Rev. Stat. 1894, § 5160, applied. *Coburn* v. *Sands*, 150 Ind. 141 (48 N. E. Rep. 786). A judgment for damages in favor of a land owner against a railroad company on account of injuries resulting to his property from the construction of the road, constitutes a prior lien against the property of the railroad, and the proceeds arising from its sale as against subsequent purchasers, mortgagees and creditors. Ill. Const. art. 2, § 13, applied. *Dickson* v. *Epling*, 170 Ill. 329 (48 N. E. Rep. 1001). The court say: "The lien relied upon here is conferred by the constitution in language not of doubtful meaning. As has been said, that instrument declares: 'Private property shall not be taken or damaged for public use without just compensation.' This provision of the constitution provides a lien for the protection of the property owners. It confers security on the property owner to his property until compensation has been made. The lien or right conferred on the property owner does not depend upon any equitable proceeding, or whether an execution may or may not be issued, but it rests upon a principle ingrafted on the organic law,—that the property of the private citizen shall not be taken or damaged for public use without just compensation."

Sec. 274. Title acquired by condemnation of land—Equities of third persons. Where the easement appropriated for the construction of a sewer is "the right to carry and conduct, under the following described lands and therein to construct, operate and forever maintain an underground main sewer and connecting sewers, drains, manholes, and underground appurtenances and to repair and renew the same", the

rights of the condemning party are limited to the easement taken; and it is not reasonably necessary for the maintenance of the main sewer to remove the soil from one part of the system to another in repairing and renewing the sewer and no right to do so is included in the taking. *Butchers' Slaughtering & M. Ass'n* v. *Commonwealth*, 169 Mass. 103 (47 N. E. Rep. 599). In condemning land for the right of way for a railroad, the railroad company has the same right to rely on the public records in determining who is the owner of the land to be condemned that any purchaser would have. Where a right of way is condenmed over land in the possession of one holding a duly-recorded tax deed thereto, and also a patent from the state based on such tax deed, under which the holder has paid the balance due the school fund on a certificate of purchase of such land as school land, a report of the commissioners making the condemnation, naming such patentee as the owner, followed by a deposit of the condemnation money with the county treasurer to his credit, and the subsequent payment to him thereof, after the expiration of the time allowed by law for an appeal from such proceedings, passes a valid title, as against the secret and undisclosed equities of the heirs of the holder of such certificate of purchase. *Phipps* v. *Kansas & C. P. Ry. Co.*, 58 Kan. 142 (48 Pac. Rep. 573).

Sec. 275. Statutes amended and new statutes. Ariz. Laws 1899, p. 62—appropriation of lands for pipe lines. Conn. Laws 1899 p. 5—proceedings where the land condemned is subject to "an estate for life or years in one or more persons or corporations, with remainder, reversion or executory devise, to another or others." Ind. Laws, 1899, p. 74—condemnation by county commissioners—procedure. Kan. Gen. Stat. 1897, §§ 1397, 1398—purposes for which land may be condemned —amended, Laws 1899, p. 191. Kan. Laws 1899, p. 316—condemnation of land for storage of water. Minn. Gen. Stat. 1894, § 2604—appropriation for right of way—amended, Laws 1899, p. 49. Minn. Laws 1899, p. 461—appropriation by street railway companies. Mont. Civ. Code § 2211—for what uses the right of eminent domain may be exercised—amended, Laws 1899, p. 135. S. C. Rev. Stat. § 1744—condemnation of right of way—method of assessing damages—amended,

Laws 1899, p. 88. Tex. Rev. Civ. Stat. art. 4471—entry by condemning party pending condemnation proceedings—amended, Laws 1899, p. 105. Tex. Rev. Civ. Stat. art. 4445—appropriation of new right of way by railroads to shorten lines or improve grades—amended, Laws 1899, p. 103. Tex. Laws 1899, p. 263—power of sewerage companies to condemn land. Wyo. Laws, 1899, p. 78—power of railroad companies to condemn land.

EQUITY.

EPITOME OF CASES.

Sec. 276. Subrogation—General principles. The right of subrogation must, in every case, rest upon some recognized subject of equitable cognizance. *Chicago Lum. Co.* v. *Anderson*, 51 Neb. 159 (70 N. W. Rep. 919). It is not essential to a claim for subrogation that the debt be paid in money, but if the creditor accepts property in full satisfaction of the demand it is sufficient. *Combs* v. *Canbler*, 95 Va. 7 (27 S. E. Rep. 815). One voluntarily discharging the mortgage debt of a third person cannot claim subrogation in the absence of an agreement to that effect. *Martin* v. *Martin*, 164 Ill. 640 (45 N. E. Rep. 1007; 56 Am. St. Rep. 219). A purchaser of land cannot be subrogated to the benefit of an incumbrance he has agreed to pay. *McDonald* v. *Quick*, 139 Mo. 484 (41 S. W. Rep. 208); *Campbell* v. *Hamilton*, Tenn. (39 S. W. Rep. 895). Citing, *Goodyear* v. *Goodyear*, 72 Ia. 329 (33 N. W. Rep. 142); *Bank* v. *Thompson*, 72 Ia. 414 (34 N. W. Rep. 184); *Carlton* v. *Jackson*, 121 Mass. 592; *Martin* v, *C. Aultman & Co.*, 80 Wis. 150 (49 N. W. Rep. 749; *Willson* v. *Burton*, 52 Vt. 394; *Kellogg* v. *Colby*, 88 Ia. 513 (49 N. W. Rep. 1001). Ordinarily a trustee advancing money to discharge an incumbrance upon the trust estate can claim the right of subrogation, but if such payment is made under circumstances which clearly indicate that the trustee did not intend to reclaim the money advanced, the right of subrogation will be held not to exist. *Farlee* v. *Field*, N. J. Eq. (36 Atl. Rep. 945). One who advances money for the

payment of an incumbrance, upon the promise merely of repayment, without any interest of his own to protect, without promise of subrogation, and without fraud or imposition upon him, is not entitled to subrogation. *Heiney* v. *Lontz*, 147 Ind. 417 (46 N. E. Rep. 665). The right of subrogation exists in favor of a creditor who has paid the amount of a mortgage or other incumbrance in order to protect his own subordinate lien, or when, as the holder of such subordinate lien, he has, through mistake or inadvertence, satisfied a prior lien upon the property covered thereby. The right must in every case rest upon some recognized principle of equity jurisprudence, such as a mistake of fact, an agreement or understanding that the money advanced was for the express purpose designated, or the like. *Seieroe* v. *Homan*, 50 Neb. 601 (70 N. W. Rep. 244).

Sec. 277. Subrogation—Payment of the whole debt as a requisite. A second mortgagee, who, for the protection of his own security, pays an installment due on the first mortgage, will, to the extent of such advancement, as against the mortgagor, be subrogated to the rights of the holder of the first mortgage, and may, upon payment by the mortgagor of the balance due on the prior mortgage, enforce by action his lien for the amount so advanced. *Skinkle* v. *Huffman*, 52 Neb. 20 (71 N. W. Rep. 1004). In discussing the doctrine that payment of the entire debt is essential to the right of equitable subrogation, the court say: "Subrogation, it is settled, both upon reason and authority, will not, except in case of estoppel, be allowed to the prejudice of other rights. This principle was recognized in the leading case of *Kyner* v. *Kyner*, 6 Watts 221, holding that substitution of one creditor for another will be denied so long as the debt, or any part thereof, remains unsatisfied, because, as held therein, until the creditor shall be wholly satisfied, there ought and can be no interference with his rights or his securities which might even by a bare possibility prejudice or embarrass him in any way in the collection of the residue of his claim. See, also, Forest Oil Co.'s Appeals, 118 Pa. St. 188 (12 Atl. Rep. 442; 4 Am. St. Rep 584); Graff's Estate, 139 Pa. St. 69 (21 Atl. Rep. 233); *Cason* v. *Laney*, 82 Tex. 317 (18 S. W. Rep. 667);

Swigert v. *Bank*, 17 B. Mon. 268; *Carter* v. *Neal*, 24 Ga. 346 (71 Am. Dec. 136); *Receivers* v. *Wortendyke*, 27 N. J. Eq. 658; *Rice* v. *Morris*, 82 Ind. 204. But the doctrine of the cases has, in every instance been invoked for the protection of the creditor, and never, so far as we are advised, to defeat contract obligations in the interest of the debtor alone. Thus understood, the exception requiring payment in full of the debt as a condition precedent to the right of subrogation is as firmly established as the rule itself. Cases are, however, not wanting, directly in point, and in which subrogation has been allowed between parties occupying towards each other the relation of co-sureties and the like upon the payment of a part only of the debt. See *Comins* v. *Pottle*, 35 N. J. Eq. 94; *Gedye* v. *Matson*, 25 Beav. 310; *Kelley* v. *Kelley*, 54 Mich. 30 (19 N. W. Rep. 580); Sheld. Subr. § 128."

Sec. 278. Subrogation—Surety's rights. A surety discharging the debt of his principal, may be subrogated to the rights of a creditor under an equitable mortgage. *Hackett* v. *Watts*, 138 Mo. 502 (40 S. W. Rep. 118). Where one occupying the position of a surety pays the debt, he is entitled to the benefit of all the securities which the principal debtor has placed in the hands of his creditors to secure the debt. *Manning* v. *Ferguson*, 103 Ia. 561 (72 N. W. Rep. 762.) Ordinarily the creditor is entitled to full satisfaction of the debt before subrogation may be invoked and the surety may not meddle with any of his rights and securities so long as any portion of the debt remains unsatisfied. *Bartholomew* v. *First Nat. Bank*, 57 Kan. 594 (47 Pac. Rep. 519).

Sec. 279. Subrogation—Furnishing money to discharge vendor's lien. One taking a mortgage on a homestead to secure a loan may be subrogated to a prior vendor's lien existing against the homestead, to the extent the money furnished by him was used to discharge such lien. *Dixon* v. *National Loan & Inv. Co.*, Tex. Civ. App. (40 S. W. Rep. 541). Where notes, given to one who furnishes money with which to discharge a vendor's lien, recited that they were given for the price of land and such conveyances are executed between the parties

as amount to a mortgage on the land to secure the payment of the loan, the holder of such notes will be entitled to be subrogated to the rights of the holder of the original vendor's lien, although such may not have been the express intention of the parties at the inception of the transaction. *Mustain* v. *Stokes*, 90 Tex. 358 (38 S. W. Rep. 758). For particular case in which it is held that persons furnishing money to discharge a vendor's lien are entitled to be subrogated to it, see *Greishaber's Ex'rs* v. *Farmer's Ex'r.*, Ky. (42 S. W. Rep. 742).

Sec. 280. Subrogation—Payment of first mortgage under agreement for first lien. One who loans money to a mortgagor to discharge a first mortgage and takes a mortgage to secure its repayment, under an agreement that he is to have a first lien on the real estate, is entitled to be subrogated to the original mortgage, as against intermediate judgment creditors of the mortgagor, where the money was paid directly to the original mortgagee and the notes delivered to the last mortgagee uncancelled, the original mortgage remaining unreleased. *Bankers' Loan & Inv. Co.* v. *Hornish*, 94 Va. 608 (27 S. E. Rep. 459). One who loans money to discharge a first mortgage upon real estate, and which is used for that purpose, not knowing of the existence of a second recorded mortgage, and takes a mortgage to secure his loan under an agreement with the mortgagor that he is to have a first lien, is entitled to be subrogated to the rights of the first mortgagee; and the fact that the record shows a release of the first mortgage does not affect this right, the second mortgagee's position not having been changed on account of such release. *Home Sav. Bank* v. *Bierstadt*, 168 Ill. 618 (48 N. E. Rep. 161; 61 Am. St. Rep. 146). The court say: "Subrogation as a principle of equity jurisprudence is generally confined to the relation of principal and surety and guarantors, or to a case where a person is compelled to remove a superior title to that held by him in order to protect his own, and also to cases of insurers. The general principle of subrogation is confined and limited to these classes of cases. *Borders* v. *Hodges*, 154 Ill. 498 (39 N. E. Rep. 597); *Bishop* v. *O'Conner*, 69 Ill. 431. While these general heads include the doctrine and principles of

subrogation, that doctrine has been steadily expanding and growing in importance and extent in its application to various subject and classes of persons. This equitable principle is enforced solely for the accomplishment of substantial justice where one has an equity to invoke which cannot injure an innocent person. The right to subrogate which springs from the mere fact of the payment of a debt, and which is included under the heads first above stated, as including the equitable principles of subrogation, is what is termed 'legal subrogation,' and exists only where included within these classes. But, in addition to this principle of legal subrogation, there exists another principle, which is termed 'conventional subrogation,' and which results from an equitable right springing from an express agreement with the debtor, by which one advances money to pay a claim for the security for which there exists a lien, and by such agreement he is to have an equal lien to that paid off. Then he is entitled to the benefit of the security which he has satisfied, with the expectation of receiving an equal lien. *Coe* v. *Railway Co.*, 31 N. J. Eq. 105; *Association* v. *Thompson*, 32 N. J. Eq. 133; *Tyrrell* v. *Ward*, 102 Ill. 29. This principle has been before this court, where the question of the necessity and effect of such an agreement was considered, in *White* v. *Cannon*, 125 Ill. 412 (17 N. E. Rep. 753), where it was held: 'It is only where the payment of incumbrances is necessary to protect the rights of the payor, or where they are paid pursuant to an agreement with the debtor that the payor shall hold them as security for the money advanced, that the payor will be subrogated to the rights of the holders of such liens, and the liens will be kept alive for his benefit. But where the demand of a creditor is paid with the money of a third person, not himself a creditor, without any agreement that the security shall be assigned or kept on foot for the benefit of such third person, the demand is absolutely extinguished.' It is the agreement that the security shall be kept alive for the benefit of the person making the payment which causes the right of subrogation to exist, because it takes away the charactor of a mere volunteer. Here the agreement between the debtor and the appellee who advanced the money was to the effect that appellee was to advance sufficient money to discharge the seven Goudy deeds of

trust, and should receive from the debtor, by way of security for the money so advanced, a first mortgage upon the seven lots. In equity that was an agreement that the Goudy deed of trust should become security for her loan. That was the substance of the transaction, and equity will effectuate the real intention of the parties where no injury is done to an innocent party by applying the principle of conventional subrogation. *Tyrrell* v. *Ward*, 102 Ill. 29; *Draper* v. *Ashley*, 104 Mich. 527 (62 N. W. Rep. 707); *Trust Co.* v. *Peters*, 72 Miss. 1058 (18 So. Rep. 497; 30 L. R. A. 829); *Levy* v. *Martin*, 48 Wis. 198 (4 N. W. Rep. 85); *Wilton* v. *Mayberry*, 75 Wis. 191 (43 N. W. Rep. 901; 17 Am. St. Rep. 193; 6 L. R. A. 61); *Dillon* v. *Kaufman*, 58 Tex. 696. This principle will be applied even where the record shows a release of the satisfied incumbrance, as the lien so satisfied will be revived for the benefit of the party satisfying the same, where there has been no gross negligence, and where justice requires it should be done; and this will be done as against a subsequent incumbrancer, whose incumbrance has not been taken or his position changed because of the record showing the discharge of the senior incombrance. *Tyrrell* v. *Ward*, 102 Ill. 29; *Hammond* v. *Barker*, 61 N. H. 53; *Emmert* v. *Thompson*, 49 Minn. 386 (52 N. W. Rep. 31; 32 Am. St. Rep. 566); *Trust Co.* v. *Peters*, 72 Miss. 1058 (18 So. Rep. 497; 30 L. R. A. 829); *Draper* v. *Ashley*, 104 Mich. 527 (62 N. W. Rep. 707); *Levy* v. *Martin*, 48 Wis. 198 (4 N. W. Rep. 85); *Bruse* v. *Nelson*, 85 Ia. 157; *Campbell* v. *Trotter*, 100 Ill. 281."

Sec. 281. Subrogation—Grantees to mortgagees. A purchaser of land who, as a part of the consideration, pays an outstanding mortgage relying upon the representations of the grantor that there are no other incumbrances on the land, is entitled to be subrogated to the rights of the mortgagee as against a junior judgment lien. *Johnson* v. *Tootle*, 14 Utah 482 (47 Pac. Rep. 1033). Citing, *Matzen* v. *Shaeffer*, 65 Cal. 81 (3 Pac. Rep. 92); *Barnes* v. *Mott*, 64 N. Y. 397 (21 Am. Rep. 625). A purchaser at a foreclosure sale will be subrogated to the rights of the holder of a mortgage which has been discharged with the purchase money, in the event that the sale is ineffectual to convey title to the property sold,

and the right passes to his assignee or grantee. *Bruschke* v. *Wright*, 166 Ill. 188 (46 N. E. Rep. 818; 57 Am. St. Rep. 125). Citing, *Rogers* v. *Benton*, 89 Minn. 89 (88 N. W. Rep. 765); *Richards* v. *Morton*, 18 Mich. 255; *Jordan* v. *Sayre*, 29 Fla. 100 (10 So. Rep. 823); *Bonner* v. *Lessley*, 61 Miss. 392. Where land incumbered by mortgage has been sold by the mortagor for its full value, and the purchase money applied in satisfaction of the mortgage debt, equity will keep the mortgage security alive for the benefit of the purchaser, and enforce it for his protection as against incumbrances subsequent thereto; and where the purchase money so applied is but a partial payment on the mortgage debt, the purchaser will be entitled to enforce the lien to the extent necessary for his reimbursement, when that will not interfere with the mortgagee's security for the unpaid balance. The right of the purchaser to subrogation in such case is not affected by notice of the incumbrances when he bought and paid for the land; nor is it necessary to his right that he show an intention was then present to keep the mortgage on foot for his protection, for that, being to his advantage, the intention will be presumed. *Joyce* v. *Dauntz*, 55 O. St. 588 (45 N. E. Rep. 900).

Sec. 282. Subrogation—Discharging mortgage liens—Particular cases. One taking a mortgage from a cotenant upon the common estate whose money is used in discharging a previous mortgage, is entitled to be subrogated to the lien of such mortgage. *Haverford Loan & Bldg. Ass'n* v. *Dougherty*, 180 Pa. St. 522 (37 Atl. Rep. 179; 57 Am. St. Rep. 657). A person, without any previous interest, who pays a mortgage debt at the instance of the mortgagor, and takes a mortgage on the same property, believing that he is getting security equal to that held by the person whose debt he pays, may, when no innocent person can be injured, be subrogated to his rights. *George* v. *Butler*, 16 Utah 111 (50 Pac. Rep. 1032). Where, at different times, one gave two different mortgages to the same person, the second excepting from its covenants the first, and afterwards conveyed the land to a third person subject to both mortgages, and the mortgagee foreclosed the junior mortgage and sold the property subject to the first

mortgage, it is held that the mortgagor afterwards paying the first mortgage may be subrogated to the mortgagee's rights under it. *Rogers* v. *Hedemark*, 70 Minn. 441 (73 N. W. Rep. 252). One who furnishes money to discharge a mortgage which has priority over another mortgage on account of an estoppel, in good faith and in reliance upon such priority, is entitled to be subrogated to the priority rights of the holder of such mortgage. *Palmer* v. *Sharp*, 112 Mich. 420 (70 N. W. Rep. 903). Where a second mortgagee for money loaned, who agrees with the mortgagor to pay the money in discharge of the first mortgage, securing a negotiable note, pays it to the original mortgagee after he has assigned the mortgage, he does so at his peril, and the assignee of the original mortgage can enforce the contract for his benefit by claiming subrogation to the lien of the second mortgagee. *Porter* v. *Ourada*, 51 Neb. 510 (71 N. W. Rep. 52). A grantor who has been compelled to pay and discharge a mortgage, which her grantee assumed and agreed to pay, is entitled to be subrogated to the rights of the original mortgagee, as against a subsequent mortgagee of such grantee. *Hubbard* v. *Knight*, 52 Neb. 400 (72 N. W. Rep. 473).

Sec. 283. Subrogation—Particular cases. A widow in possession of lands in which she has an unassigned dower right, who pays the amount of a mortgage thereon, is entitled to be subrogated to the lien of the mortgage as against the owners of the remaining interests in the land, to secure the amount paid by her with interest. *Becker* v. *Carey*, N. J. Eq. (36 Atl. Rep. 770). Where a husband conveys land to his wife and subsequently purchases another parcel which he causes to be conveyed to her, the purchase price of which is secured by notes and a mortgage upon both parcels signed by them both, in the absence of some agreement to the contrary, it will be presumed that he intended her to be the owner of the land, although she had no income with which to meet the notes, and he cannot, by asserting a right of subrogation, affect her title by paying the notes and taking an assignment of the mortgage. *Danforth* v. *Briggs*, 89 Me. 316 (36 Atl. Rep. 452). Where a devise of land to an executor, directs the application of the income therefrom,

to the payment of the support and funeral expenses of a third person, in such a manner as to make these charges a lien on the land, persons who furnish such support and pay such funeral expenses, may be subrogated to the lien without any previous demand upon such executors or the testator's other devisees. *Clark* v. *Marlow*, 149 Ind. 41 (48 N. E. Rep. 859). A subsequent grantee of land charged with notice of its conveyance in fraud of creditors by a prior grantor, who discharges the mortgage thereon, is entitled to be subrogated to the mortgagee's rights, upon his conveyance being set aside. *Arnold* v. *Hoschildt*, 69 Minn. 101 (71 N. W. Rep. 829). Where one of two joint makers of a mortgage note pays the same before maturity he becomes subrogated to the rights of the original creditor, as against his co-maker for the latter's share of the debt; and the act of the creditor in transferring the note to such payor and in leaving the mortgage uncancelled upon the record, does no more than to preserve the vitality of this unquestioned right. *Truss* v. *Miller*, 116 Ala. 494 (22 So. Rep. 868). La. Rev. Civ. Code, arts. 2060, 2161, relative to payment with subrogation, have no reference to the purchase of promissory notes secured by mortgage. *Perkins* v. *Gumbel*, 49 La. 658 (21 So. Rep. 748). Where a purchaser of two lots whose notes, secured by a vendor's lien thereon, were outstanding for the purchase price, sold one of the lots to another, who in payment thereof assumed the payment of both the outstanding notes and gave his note for an additional sum secured by a second vendor's lien, which latter note the original vendee endorsed to another, it is held that upon the foreclosure of the first vendor's lien, the original vendee having the lot he had sold, first applied to the satisfaction of the lien, it yielding a sufficient sum for that purpose, the endorsee of the second note could not claim a vendor's lien against the lot retained by such original vendee, by way of subrogation, although such vendee failed to make him a party to the action foreclosing the original lien, the liability of such vendee as endorser never having been fixed, and it appearing that such liability had been discharged by the failure of the holder of the note to present it for payment at maturity. *Hutchinson* v. *Crutcher*, 98 Tenn. 421 (39 S. W. Rep. 725; 37 L. R. A. 89).

Sec. 284. Relief from mistakes. Equity may relieve in cases of deficiency or excess in the estimated quantity upon the sale of land, whether occasioned by the mutual mistake of the parties, or the mistake of one of them resulting from the fraud or culpable negligence of the other. *Hull* v. *Watts*, 95 Va. 10 (27 S. E. Rep. 829). Particular evidence held sufficient to authorize the setting aside of a sheriff's sale on account of mutual mistake. *Howlett* v. *Central Car. L. & Imp. Co.*, 50 S. C. 1 (27 S. E. Rep. 533). Cal. Civ. Code, § 1577, construed and applied—relief from mistakes or fraud. *Moore* v. *Copp*, 119 Cal. 429 (51 Pac. Rep. 630). See Reformation.

Sec. 285. Equitable conversion. A discretionary power to sell given to an executor, does not of itself convert the real estate into personalty. *Seeds* v. *Burk*, 181 Pa. St. 281 (37 Atl. Rep. 511); *Battersby* v. *Castor*, 181 Pa. St. 555 (37 Atl. Rep. 572). The fact that a devise of real estate is void does not operate to convert it into personal property, as against the heirs, because the executors are authorized to convert it into money to carry out the provisions of the will. *Fifield* v. *Van Wyck's Ex'r*, 94 Va. 557 (27 S. E. Rep. 446; 64 Am. St. Rep. 745). Where a will contemplates as to the legacies therein named, that it should be executed in personalty only, the doctrine of equitable conversion applies as to so much of the real estate as is necessary to be sold to pay the legacies. *McHugh* v. *McCole*, 97 Wis. 166 (72 N. W. Rep. 631; 65 Am. St. Rep. 106; 40 L. R. A. 724). Where confirmation of a sale of decedent's realty is necessary in order to pass title, it is not converted into personalty so as to descend as such until such confirmation. *In re Schmid's Estate*, 182 Pa. St. 267 (37 Atl. Rep. 928). A judicial sale of lands, as a general rule, converts it into personalty. If land be sold under ch. 79 or 83 of W. Va. Code 1891, belonging to an infant or insane person, the sale does not at once convert it into personalty, but the proceeds remain realty until the infant becomes of age, and in case of one insane until he becomes capable of making a will, when they are to be regarded as personalty. *Findley* v. *Findley*, 42 W. Va. 372 (26 S. E. Rep. 433).

Sec. 286. Doing equity. A wife will not be heard to assert an equitable interest in lands of her husband, as against his creditors, while she retains other lands conveyed to her by him in satisfaction of the asserted equities. *Lewis* v. *Stanley*, 148 Ind. 351 (45 N. E. Rep. 698). One seeking a resale of property sold upon foreclosure, on account of the nonperformance of a side agreement of the purchaser to pay an additional sum, made at the time of sale, must provide for the refundment of the price paid which has been used to discharge the mortgage lien. *Bruschke* v. *Wright*, 166 Ill. 188 (46 N. E. Rep. 813; 57 Am. St. Rep. 125). Where a wife takes a voluntary conveyance of her husband's real estate which is subject to a valid mortgage, and he subsequently without authority, mortgages the land to another who has discharged the valid mortgage for him, she cannot maintain a bill to quiet her title against the subsequent mortgagee without repaying to him whatever amount of money he advanced to discharge the other mortgage, in express reliance upon her husband's promises that he should have the same security as the mortgagee, he believing that the husband still held title to the land. *Martin* v. *Martin*, 164 Ill. 640 (45 N. E. Rep. 1007; 56 Am. St. Rep. 219).

ESTATES.

EPITOME OF CASES.

Sec. 287. Creation of absolute estate—Gift over to another. Where an instrument creates an absolute estate in the first taker, a gift over of what shall remain undisposed of at the time of his death is void. *Wilson* v. *Turner*, 164 Ill. 398 (45 N. E. Rep. 820). Upon this subject in the recent case of *Mulvane* v. *Rude*, 146 Ind. 476 (45 N. E. Rep. 659), the supreme court of Indiana say: "When the real estate is given absolutely to one person, with a gift over to another of such portion as may remain undisposed of by the first taker at his death, the gift over is void, as repugnant to the absolute property first given; and it is also established law that, where an estate is given to a person generally, or indefinitely,

with a power of disposition, it carries a fee, and any limitation over is void for repugnancy. *Wiley* v. *Gregory*, 135 Ind. 647, 652 (35 N. E. Rep. 507); *South* v. *South*, 91 Ind. 221, 222 (46 Am. Rep. 591); *Jackson* v. *Robins*, 16 Johns. 588, and cases cited; *Helmer* v. *Shoemaker*, 22 Wend. 137; *Campbell* v. *Beaumont*, 91 N. Y. 464; *Ide* v. *Ide*, 5 Mass. 500; *Burbank* v. *Whitney*, 24 Pick. 146 (35 Am. Dec. 312); *Bacon* v. *Woodward*, 12 Gray 376; *Bowen* v. *Dean*, 110 Mass. 438; *Gifford* v. *Choate*, 100 Mass. 343; *Kelley* v. *Meins*, 135 Mass. 231, 234; *Williams* v. *Worthington*, 49 Md. 572 (33 Am. Rep. 286); *Combs* v. *Combs*, 67 Md. 11 (8 Atl. Rep. 757; 1 Am. St. Rep. 359); *Stowell* v. *Hastings* 59 Vt. 494 (8 Atl. Rep. 788; 59 Am. Rep. 748); *Chaplin* v. *Doty*, 60 Vt. 712 (15 Atl. Rep. 362); *Judevine's Ex'rs* v. *Judevine*, 61 Vt. 587 (18 Atl. Rep. 778; 7 L. R. A. 517, and note); *Rubey* v. *Barnett*, 12 Mo. 3 (49 Am. Dec. 112, and note on pages 115-119); *Bean* v. *Kenmuir*, 86 Mo. 666; *Norris* v. *Hensley*, 27 Cal. 439; *Smith* v. *Starr*, 3 Whart. 62 (31 Am. Dec. 498, and note on pages 501, 502); *Jauretche* v. *Proctor*, 48 Pa. St. 466; *Seibert* v. *Wise*, 70 Pa. St. 147; *McClellan* v. *Larchar*, 45 N. J. Eq. 17 (16 Atl. Rep. 269); *Hall* v. *Palmer*, 87 Va. 354 (12 S. E. Rep. 618; 24 Am. St. Rep. 653; 11 L. R. A. 610, and note); *Rong* v. *Meier*, 47 Ia. 607 (29 Am. Rep. 493); *Bills* v. *Bills*, 80 Ia. 269 (45 N. W. Rep. 748, and cases cited; 8 L. R. A. 696; 20 Am St. Rep. 418, and note); *Ramsdell* v. *Ramsdell*, 21 Me. 288; *Jones* v. *Bacon*, 68 Me. 34 (28 Am. Rep. 1, and note on page 4); *Mitchell* v. *Morse*, 77 Me. 423 (1 Atl. Rep. 141; 52 Am. Rep. 781); *Larsen* v. *Johnson*, 78 Wis. 300 (47 N. W Rep. 615; 23 Am. St. Rep. 404, and note on pages 409, 410); *Howard* v. *Carusi*, 109 U. S. 725 (3 Sup. Ct. Rep. 575); 4 Kent. Comm. (13th Ed.) 535, 536. The only exception to this rule is where the testator gives the first taker an estate for life only, by certain and express terms, and annexes to it the power of disposition. In that particular special case the devisee for life will not take an estate in fee, notwithstanding the naked gift of a power of disposition. *Wiley* v. *Gregory*, 135 Ind. 647, 652 (35 N. E. Rep. 507); *Wood* v. *Robertson*, 113 Ind. 323 (15 N. E. Rep. 457); *Downie* v. *Buennagel*, 94 Ind. 228; *South* v. *South*, 91 Ind. 221, 222 (46 Am. Rep.

591); *Jackson* v. *Robins*, 16 Johns. 588, and cases cited; *Ide* v. *Ide*, 5 Mass. 500; *Rubey* v. *Barnett*, 12 Mo. 3 (49 Am. Dec. 112, and note on pages 115–119); *Appeal of Hinkle* 116 Pa. St. 490 (9 Atl. Rep. 988); *Burleigh* v. *Clough*, 52 N. H. 267 (13 Am. Rep. 23); *Logue* v. *Bateman*, 43 N. J. Eq. 434 (11 Atl. Rep. 259); *McCullough's Adm'r* v. *Anderson*, 90 Ky. 126 (13 S. W. Rep. 853; 7 L.R. A. 832, and note); *Stuart* v. *Walker*, 72 Me. 146 (39 Am. Rep. 311, and note); note to *Larsen* v. *Johnson*, 78 Wis. 300 (47 N. W. Rep. 615; 28 Am. St. Rep. 404, note page 410); 4 Kent, Comm. (13th Ed.) 535, 536."

Sec. 288. Creation of fee simple estate. Where the granting and habendum clause in a deed show that the grant is made to the grantee and "her heirs and assigns, forever," a fee simple estate is created which is not reduced to a life estate by a subsequent provision in the deed, that if the grantor should "die leaving no lawful issue of her body," the lands conveyed should go to others named "and their heirs, forever," and that the grantor and her husband "are to be allowed to reside at their present home on said land for and during his and her natural life, and shall have the right of making her and his support thereon." *Glenn* v. *Jamison*, 48 S. C. 316 (26 S. E. Rep. 677). In Connecticut it is held that upon the death of the testator, a devisee under his will takes a fee under a devise to him providing that if the devisee should "die without issue" the land would go to another, it not clearly appearing that the words "die without issue" were intended to mean "die without issue" after the testator's death. *Lawlor* v. *Holohan*, 70 Conn. 87 (38 Atl. Rep. 903). A mere request by a testator in his will as to the disposition a devisee should make of a portion of the devised estate unconsumed at the time of the death of the devisee, does not create a trust or cut down an otherwise absolute estate. *Clark* v. *Hill*, 98 Tenn. 300 (39 S. W. Rep. 339). A devise to a testator's wife "absolutely and forever" with power to dispose of it as she deems proper, passes to her a fee, and a subsequent clause disposing of the property remaining at her death will be treated as precatory only. *Barth* v. *Barth*, Ky. (38 S. W. Rep. 511). A devise of land "to my wife L. J., and if she want

to leave it she is to let A. E. J. have the place in trust for his children," is held to give the wife a fee simple. S. C. Rev. Stat. § 1995, applied. *Johnson* v. *Johnson*, 48 S. C. 408 (26 S. E. Rep. 722). Where it appears by a will that the testator knew how to create a life estate when he so desired, a devise "I give to my wife, H. A. W., for a home, my one-half undivided interest in the real estate in which I now reside," is held to give her the fee. *Wilkinson* v. *Chambers*, 181 Pa. St. 487 (37 Atl. Rep. 569). Where a testator, by his will, gave a farm to his son J.; he then gave another farm to his second son, and other two farms to his wife, with remainder to his third and fourth sons; he then provided that none of the farms given to his sons should be sold by them during the life of his wife, and that if any of his sons should die without leaving issue, but leaving a widow, the farm of such son should go to his widow, during her widowhood, and afterwards to the heirs at law of the testator, it is held that J. took a vested estate in fee simple in the farm devised to him, subject, however, to be divested by his death, during the lifetime of his mother, without leaving issue, but leaving a widow; that by the death of the testator's wife during the lifetime of J., the limitation over to the heirs of the testator was defeated, and the estate of J. became indefeasible. *Patterson* v. *Madden*, 54 N. J. Eq. 714 (36 Atl. Rep. 278). A conveyance to a trustee for the benefit of H "until he shall attain the age of twenty-one years, after which he shall assume control of said property for himself," with the provision that if H. die without heirs of his body, the property shall revert to the grantor, passes the fee to H., defeasible upon his death at any time without heirs of his body. *Trimble* v. *Shawhan*, Ky. (41 S. W. Rep. 546). Particular devises held to create an estate in fee simple. *Kinkele* v. *Wilson*, 151 N. Y. 269 (45 N. E. Rep. 869); *Young* v. *Kinkead's Adm'r*, Ky. (40 S. W. Rep. 776).

Sec. 289. Estates tail. Where a devise of land to one provides that in case the devisee dies leaving no heirs lawfully begotten, then the realty shall go to another naming him, it is held that the first devisee does not take the fee simple but merely an estate tail by implication. *Chesebro* v. *Palmer*, 68

Conn. 207 (86 Atl. Rep. 42). Applying the rule in Shelley's Case and the statute of Pennsylvania, one in whom an estate tail has been created may bar an entail. *Sheeley* v. *Neidhammer*, 182 Pa. St. 168 (37 Atl. Rep. 989). Applying Ill. Act, July 1, 1872, § 6, converting an estate tail into a life estate in the first taker, it is held that a devise to the testator's wife "and her heirs by me" gives her a life estate and a vested remainder in fee simple to the designated heirs. *Welliver* v. *Jones*, 166 Ill. 80 (46 N. E. Rep. 712). Ind. Rev. Stat. 1843, p. 424, § 57, construed and applied—limitation of a remainder upon a fee tail estate. *Moore* v. *Gary*, 149 Ind. 51 (48 N. E. Rep. 680).

A devise to "W. and his heirs, being his own children, forever," creates at common law an estate tail, which by Ind. Rev. Stat. 1843, p. 424, § 56, is converted into an estate in fee simple. *Moore* v. *Gary*, 149 Ind. 51 (48 N. E. Rep. 680). The court say: "At common law, a devise to one and his children carried an estate in joint tenancy, when the person named had children living at the time of the devise; but when no such children existed the term 'children' was construed as a word of limitation, and as equivalent to 'issue' or 'heirs of his body,' and the parent took an estate tail. *Wild's Case*, 6 Coke 17; *Hannan* v. *Osborn*, 4 Paige 336; *Nightingale* v. *Burrell*, 15 Pick. 104–114; *Wheatland* v. *Dodge*, 10 Metc. (Mass.) 502; *Shotts* v. *Poe*, 47 Md. 513 (28 Am. Rep. 485); *Parkman* v. *Bowdoin*, 1 Sumn. 359 (18 Fed. Cas. 1213); *Wood* v. *Baron*, 1 East 259; *Davie* v. *Stevens*, 1 Doug. 321–328; 2 Jarm. Wills (6th Am. Ed. by Bigelow) 388–390; 3 Jarm. Wills (Rand. & T. Ed.) 174–177, 182, 204; Schouler Wills (2d Ed.), § 555."

Construing Ohio Rev. Stat. § 4200 restricting the entailment of real estate which provides that "No estate in fee simple, fee tail, or any lesser estate in lands or tenements lying within this state, shall be given or granted by deed or will to any person or persons but such as are in being, or to the immediate issue or descendants of such as are in being at the time of making such deed or will; and all estates given in tail shall be and remain an absolute estate in fee simple to the issue of the first donee in tail," it is held that the statute supercedes the rule of the common law upon the subject; that it inhibits only

devises to persons who are in fact more remote than the immediate issue of persons in being at the death of the testator; and within the meaning of the act, a child *in utero* at the testator's death is in being. *Phillips* v. *Herron*, 55 O. St. 478 (45 N. E. Rep. 720).

Sec. 290. Rule in Shelley's case. The rule prevails in Pennsylvania and applies to devises although its application may operate to defeat the intention of the testator. *Sheeley* v. *Neidhammer*, 182 Pa. St. 163 (37 Atl. Rep. 939). The rule still prevails in North Carolina and is held to apply to a devise to one "during his natural life, and at his death to his bodily heirs." *Chamblee* v. *Broughton*, 120 N. C. 170 (27 S. E. Rep. 111). In the case of *Stamper* v. *Stamper*, 121 N. C. 251 (28 S. E. Rep. 20), the supreme court of North Carolina refer to the rule in *Shelley's Case* as follows: "The Don Quixote of the law, which, like the last knight errant of chivalry, has long survived every cause that gave it birth, and now wanders aimlessly through the reports, still vigorous, but equally useless and dangerous." The rule is held to apply to a devise of real estate to one to have "all the income or emoluments arising from the same during his natural life * * * and at his death the same shall descend to his natural heirs." *Curry* v. *Patterson*, 183 Pa. St. 238 (38 Atl. Rep. 594). The rule is held not to apply to a devise to a testator's son for life and after death to the "heirs of his body by him begotten," with remainder over if he should have no "heirs of his body, by him begotten, him surviving." *Granger* v. *Granger*, 147 Ind. 95 (44 N. E. Rep. 189; 46 N. E. Rep. 80; 36 L. R. A. 186). See opinion for extensive review of authorities. Particular devise held not to come within the rule. *Collins* v. *Williams*, 98 Tenn. 525 (41 S. W. Rep. 1056). The rule is abrogated in Kansas by Gen. Stat. 1889, par. 7256, providing that "when lands tenements, or hereditaments are given by will to any person for his life, and after his death to his heirs in fee, or by words to that effect, the conveyance shall be considered to vest an estate for life only in such part taken, and the remainder in fee simple in his heirs." *Keith* v. *Eaton*, 58 Kan. 782 (51 Pac. Rep. 271). Mill. & V. Tenn. Code, § 2814 (Shannon's Code, § 3674), abrogating the rule in

Shelley's Case, is held not to apply where a decree of partition vested the interest of one of the parties in her "for her sole and separate use during her life, and at her death to her children then living and the issue of such children as may be dead." *Bigley* v. *Watson*, 98 Tenn. 353 (39 S. W. Rep. 525; 38 L. R. A. 679).

Sec. 291. Creation of life estate. The common-law rule, that a general devise of real estate, without defining the interest to be taken by the devisee, gives only a life estate, which was abolished in England in 1837, is in force in Indiana although it was abolished by Rev. Stat. 1843, p. 485, § 5, until 1853; but this rule does not require that the word "heirs" be used to convey a fee. *Mulvan* v. *Rude*, 146 Ind. 476 (45 N. E. Rep. 659); *Rusk* v. *Zuck*, 147 Ind. 388 (45 N. E. Rep. 691). The power of absolute disposition annexed to a life estate, does not enlarge it to an estate in fee. *Skinner* v. *McDowell*, 169 Ill. 365 (48 N. E. Rep. 310; 61 Am. St. Rep. 183); *Rusk* v. *Zuck*, 147 Ind. 388 (45 N. E. Rep. 691; 46 N. E. Rep. 674). Where a decree vests title in a trustee for a married woman, for her separate use and benefit during her natural life, and at her death said land is to descend to her children by said J. L. * * * * but may be sold by the trustee and reinvested at the instance of said "married woman," it gives her only a life estate. *Beard* v. *Utley*, Tenn. (39 S.W. Rep. 735). A deed of land to R. and E., "to have and to hold the same with general warranty to them and their heirs forever. The condition of this deed is that said land is conveyed to R. for his special use, benefit and profit, for and during his natural life and at his death to his son E., to him and his heirs or assigns, forever" gives R. a life estate with remainder in fee to E. *Tempee's Admi'r* v. *Wright*, 94 Va. 338 (26 S. E. Rep. 844). In South Carolina it is held that a conveyance of certain land to E to have and and to hold to "him and his forever," in which the grantor warrants the lands unto "E. and his heirs," but which stipulates that the land should revert to the grantor or his heirs if E. should die without children, is held to convey only a life estate. *Wilson* v. *Watkins*, 48 S. C. 341 (26 S. E. Rep. 668).

The devise of real estate to the testator's widow, "giving

her full power and authority to sell the whole or any part of my said real estate and execute deed or deeds therefor; and in case any of my said real estate be left after the death of my said wife I order it to be divided amongst my children share and share alike," is held to give the wife a life estate only. *In re Schmid's Estate*, 182 Pa. St. 267 (37 Atl. Rep. 928). Substantially the same is held in *Skinner* v. *McDowell*, 169 Ill. 365 (48 N. E. Rep. 310; 61 Am. St. Rep. 183). A devise of the residuum of a testator's estate to his wife "to have and to hold the some to her use and benefit forever," which provided that it is distinctly understood that my wife is to be amply supported and maintained out of said estate during her natural life and use and dispose of the same as she sees fit; and at her decease the remainder of said estate, if any, shall go to my brothers S. N. and J. T. L., is held to give the wife a life estate only. *Langley* v. *Tilton*, 67 N. H. 88 (36 Atl. Rep. 610). Where, by one sentence in his will which closes with the words, "this to be hers during her natural life, and what is left at her death to go to my heirs at law," a testator devised certain described real estate, numerous items of personal property and lastly a sum of money, to his wife, it is held that she took a life estate only in the land. *Rusk* v. *Zuck*, 147 Ind. 388 (45 N. E. Rep. 691). A devise of the residuum of the testator's estate to his wife "to have and to use and to dispose of during her natural life, and after her death to be divided equally among my three youngest heirs," is held to give a life estate to the widow with added power to dispose of the fee and the property undisposed of by her at her death descends to the three heirs. *Ernst* v. *Foster*, 58 Kan. 488 (49 Pac. Rep. 527).

A devise by a testator of the residue of his estate to his wife "for her to dispose and live on during her lifetime; and, if there be anything at her deceast after left after her deceast and burial, I give and bequeath to the B. C. Church, for poor children, for their tuition" is held to give her a life estate with power of disposition during her lifetime. *Dye* v. *Beaver Creek Church*, 48 S. C. 444 (26 S. E. Rep. 717; 59 Am. St. Rep. 724). A devise to the testator's widow of all his property "to do with it in whatever way she may think proper as long as she remains single and lives, and after her death to my

children who may be living, or the legal heirs of them who may die, to them and their heirs, forever," is held to give the widow only a life estate with power to sell, manage and control it in any way she thought proper while she lived and remained single. *Loeb* v. *Struck*, Ky. (42 S. W. Rep. 401). Applying Vt. Stat. § 2201, which provides that where by the common law a person might become seised in fee tail of lands by virtue of a devise, gift, grant, or other conveyance, or by other means, such person instead of being seised thereof in fee tail, shall be seised thereof for his natural life only, and the remainder shall pass in fee simple absolute to the person to whom the estate tail would, on the death of the first grantee, devisee, or donee, in tail, first pass, according to the course of the common law, by virtue of such devise, gift, grant or conveyance, it is held that where a testator gave his wife the use of his real estate during her natural life, and devised one-half of what should remain of his real estate at the decease of his wife to his daughter M. P. to be held by her in her own right and the heirs of her body forever, the daughter, upon the death of the wife, took an estate for life only and the remainder passed in fee to the heirs of her body. *In re Kelso's Estate*, 69 Vt. 272 (37 Atl. Rep. 747). For construction of particular devises held to create life estates, see *Eldred* v. *Shaw*, 112 Mich. 287 (70 N. W. Rep. 545); *McMillan* v. *Farrow*, 141 Mo. 55 (41 S. W. Rep. 890); *Wilson* v. *Curtis*, 90 Me. 463 (38 Atl. Rep. 365).

Sec. 292. Conveyance of life estate. Where, by the terms of the instrument creating it, the continuance of a life estate is dependent upon the life tenant occupying the premises, and he is forbidden to transfer the same, a conveyance by him followed by a termination of his occupancy of the premises operates to terminate the life estate. *Lariverre* v. *Rains*, 112 Mich. 276 (70 N. W. Rep. 583). Where a trust deed created a life estate with a remainder over to a certain class a sale and conveyance by the personal representative of the life tenant after his death, made indirectly to himself, does not pass any title as against the person who is subsequently determined to be entitled to the estate in remainder. *Simms* v. *Freiherr*, 100 Ga. 607 (28 S. E.

Rep. 288). Where a life tenant who is also an heir of the reversioner attempts to convey the fee, his grantee takes the fee of such life tenant's interest as heir. *Wilson* v. *Watkins*, 48 S. C. 341 (26 S. E. Rep. 663). Where the holder of a life estate in land devised "for her entire use and benefit so long as she shall live, with permission to sell and use the same or any part of it if she shall need it for her comfortable support and maintenance," without investigating the value of the land, unnecessarily sold it for less than half its value, the remainderman may have equitable relief against the purchaser charged with notice of his equities. *Price* v. *Bassett*, 168 Mass. 598 (47 N. E. Rep. 243). Pa. Act, Oct. 13, 1840; Act, Jan. 24, 1849, construed and applied—execution sale of life estate by creditors. *Kunselman* v. *Stine*, 183 Pa. St. 1 (38 Atl. Rep. 414). A new statute in Virginia authorizes the sale of an estate given by deed or will to a person for life, with a vested remainder to another, whether the remainderman be an infant or adult. Laws 1897–98, p. 404.

Sec. 293. Life tenant with power of disposition—Rights of creditors and purchasers. Construing and applying Minn. Gen. Stat. 1894, § 4309, which provides "When an absolute power of disposition, not accompanied by any trust, is given to the owner of a particular estate for life or years, such estate shall be changed into a fee; absolute in respect to the rights of creditors and purchasers, but subject to any future estate limited thereon in case the power is not executed, or the lands are sold for the satisfaction of debts;" § 4312, which provides "When a general and beneficial power to devise the inheritance is given to a tenant for life or for years, such tenant will be deemed to possess an absolute power of disposition within the meaning and subject to the provisions of the three preceding sections;" and § 4313, which provides that "every power of disposition shall be deemed absolute by means of which the grantee is enabled in his lifetime to dispose of the entire fee for his own benefit," it is held that a devise of land to R. for life with a general and beneficial power to devise the remainder in fee, gives R. an absolute power of disposition of the lands, and his life estate is changed into a fee simple as respects the rights of creditors and pur-

chasers. *Hershey* v. *Meeker Co. Bank*, 71 Minn. 255 (78 N. W. Rep. 967).

Sec. 294. Rights and liabilities of life tenant and remainderman. The interest of a remainderman is not liable for taxes which have accumulated against the life tenant. *Loeb* v. *Struck*, Ky. (42 S. W. Rep. 401); *State* v. *Campbell*, Tenn. (41 S. W. Rep. 937). For discussion of the relative rights of life tenant and remaindermen as to improvements, repairs and insurance, see *Stevens* v. *Melcher*, 152 N. Y. 551 (46 N. E. Rep. 965). A life tenant may purchase the interest of a remainderman, and the conveyance of such interest to him will not be set aside solely on the ground of inadequacy of price. *Ware* v. *Fronk's Adm'r*, Ky. (38 S. W. Rep. 1061). Surface stone which is an obstruction to his reasonable enjoyment of the estate, may be removed by a life tenant, but he must account to the remainderman for any profit realized from the sale of such stone. *Roberts* v. *Armstrong*, Ky. (40 S. W. Rep. 459). It is waste for a tenant for life to take petroleum oil from the land. The rule is the same where the life tenant owns the fee in a proportionate part of the real estate. In an action for waste against a life tenant for removing petroleum oil without right, he is not entitled to have the proceeds thereof invested so that he may have interest thereon durng the life estate, but they go at once to the owner of the next vested estate of inheritance. *Williamson* v. *Jones*, 43 W. Va. 652 (27 S. E. Rep. 411; 64 Am. St. Rep. 891; 38 L. R. A. 694). Compensation to a life tenant for the grant of a right of way over the premises, which is intended to cover only the damages sustained by him, belongs to him and not to the remainderman. *Roberts* v. *Armstrong*, Ky. (40 S. W. Rep. 459). Where a tort upon real estate affects both the estate of the tenant and that of a reversioner or remainderman, each may sue separately; and as the damages are apportionable, each recovers damages to cover the injury done to his estate. Neither can recover damages covering the entire injury to both estates. *Jordan* v. *City of Benwood*, 42 W. Va. 312 (26 S. E. Rep. 266; 57 Am. St. Rep. 859; 36 L. R. A. 519); *Yeager* v. *Town of Fairmont*, 43 W. Va. 259 (27 S. E. Rep. 234). In

the second case cited, it is held that where the owner of the life estate and the owner of the remainder in fee, are engaged as partners in a mercantile business in a store room upon real estate affected by the tort, they cannot recover in the same action for damage done to the life estate, the remainder and the joint mercantile business. Where, before the expiration of his lessee's term a life tenant dies, the lease is terminated and the lessee may quit possession. If he continues in possession he becomes liable to the reversioner for the reasonable value of the use, and occupation of the premises, but the latter cannot recover of the life tenant's administrator money paid to him by such lessee as rental for the remainder of the term under the lease. *Guthmann* v. *Vallery*, 51 Neb. 824 (71 N. W. Rep. 784; 66 Am. St. Rep. 475). A life tenant cannot litigate the validity of a devise on account of its being in violation of the statute against perpetuities, where that question cannot arise unless she dies without issue. *In re Well's Estate*,, 69 Vt. 388 (38 Atl. Rep. 83). N. Y. Code Civ. Proc., § 1680, providing that, "where a tenant for life or for a term of years suffers judgment to be taken against him by consent or by default in an action of ejectment or action for dower, the heir or person owning the reversion or remainder may, after the determination of the particular estate, maintain an action of ejectment and recover the property," authorizes an action by a remainderman claiming under a manorial lease to set aside default or consent judgments in ejectment against the life tenant, to have his title determined and an accounting as to rents; and N. Y. Rev. Stat., Vol. 2, p, 506, §§ 33, 34, which permits the tenant at any time within six months after the landlord has been placed in possession under an ejectment suit, to pay up all rent in arrear, together with the costs, and failing in that, is barred and foreclosed from all relief or remedy in law or equity, does not apply so as to bar such action. *Sands* v. *Church*, 152 N. Y. 174 (46 N. E. Rep. 609).

Sec. 295. Estates in joint tenancy. The common law, as to joint tenancies, prevailed in Kansas until abolished by Laws 1891, ch. 208, and a will of a father executed before the enactment of that statute, which reads: "I bequeath to my son, Thomas, the sum of one dollar, and to Amanda Anne,

wife of my son, Thomas, and her children, I bequeath the Fisher farm,"—will be construed to create a joint tenancy in the mother and children, and to evidence an intent to exclude the son from any inheritable interest in the land under the statute of descents, as the heir of the wife or children, there being no other words in the will from which a different intent can be inferred. *Noble* v. *Teeple*, 58 Kan. 898 (49 Pac. Rep. 598). Construing and applying Starr & C. Ann. Ill. Stat., Vol. 1, p. 571, which provides that no estate in joint tenancy shall be claimed under any conveyance "unless the premises therein mentioned be thereby declared to pass not in tenancy in common but in joint tenancy," it is held that an estate in joint tenancy is created by an estate made to "K. S. & H. S., her husband, and the survivor of them, in his or her own right, * * * unto said party of the second part, their heirs or assigns, forever," there being added after the description of the premises the words, "the conveyance herein is made to said grantee in joint tenancy." *Slater* v. *Gruger*, 165 Ill. 829 (46 N. E. Rep. 235).

Sec. 296. **Future estates.** A future estate is not void on account of the suspension of the power of alienation, under Wis. Rev. Stat. 1878, §§ 2088, 2089, where the suspension of the power of alienation must, under all circumstances, terminate at or before the termination of the second life. *Tyson* v. *Houghton*, 96 Wis. 59 (71 N. W. Rep. 94). A conveyance of land, including parts of a certain road, whenever another street named is opened and said road is closed, is not a conveyance to begin in *futuro*, but is a conveyance of the title subject to the public easement, and becomes absolute as soon as the easement ceases by the opening of the other street. *Baldwin* v. *Trimble*, 85 Md. 396 (37 Atl. Rep. 176; 36 L. R. A. 489).

Sec. 297. **Expectant estates—Conveyance.** A conveyance by a presumptive heir of his expectant interest in the estate of an ancestor is valid without the consent of such ancestor, who is insane, where the transaction is otherwise unobjectionable. *Hale* v. *Hollon*, 90 Tex. 427 (39 S. W. Rep. 287; 59 Am. St. Rep. 819; 36 L. R. A. 75). The court

reviews the conflicting authorities and expressly disapproves the case of *McClure* v. *Raben*, 133 Ind. 507, cited in Ballards' Law of Real Property, Vol. IV, § 131. A deed by an heir apparent of his expectancy, while ineffectual as a conveyance, may operate as an estoppel in favor of a purchaser for value, in possession. *Buford* v. *Adair*, 43 W. Va. 211 (27 S. E. Rep. 260; 64 Am. St. Rep. 854). Citing, *Hart* v. *Gregg*, 32 O. St. 502. Persons to whom a fund has been devised, cannot convey their expectant interest therein, and in order for such a conveyance to be enforcible in equity as a contract to convey, it must be based upon a valuable consideration. *In re Lenhig's Estate*, 182 Pa. St. 485 (38 Atl. Rep. 466; 61 Am. St. Rep. 725).

Sec. 298. Contingent remainders. Where a will provided that the residue and remainder of the testator's estate should remain in the care and control of his executrix, executors and trustees and their successors until the decease of the last survivor of the annuitants named therein, and then the said "residue and remainder with all the accumulated interest thereof, shall be equally divided amongst my grandchildren, *per stirpes*," it is held that the grandchildren took a contingent remainder in such residue. *Hale* v. *Hobson*, 167 Mass. 397 (45 N. E. Rep. 913). Where one seeking partition of lands in which she has an interest, consents to a decree assigning a portion of the land to her "for her sole and separate use during her life and at her death to her children then living, and the issue of such as may be dead," such a decree is binding upon her and creates a valid contingent remainder in fee. Such a remainder ceases only upon the death of the life tenant, regardless of her advanced age at the time of the death of the last of her issue before her. Until her death the residence of the inheritance is in her and not in abeyance, and if the line of remainder men is extinct at her death, a devise of it by her becomes operative. *Bigley* v. *Watson*, 98 Tenn. 353 (39 S. W. Rep. 525; 38 L. R. A. 679). See opinion for exhaustive discussion of the residence of the fee during the existence of the contingent remainder. A contingent remainder is held to be created by a testator's devise to his four children in a will providing "I give and bequeath to my beloved wife Elizabeth

J. Leavitt, all my estate, both real and personal, of which I may be possessed at the time of my decease, for her use and benefit during her life, and at her decease, whatever there may be left of said estate or the effect of the same, I hereby order and direct that it shall be apportioned equally among my children, to wit, Elizabeth J. Palmer, William C. Leavitt, Samuel K. Leavitt, and Caroline M. Goddard, if they shall be living, but if they or any of them shall [die] previous to the fulfillment of this or the death of my wife, Elizabeth J. Leavitt, then his or her portion or share in said estate shall descend to his or her children for their use and benefit forever." *Robinson* v. *Palmer*, 90 Me. 246 (38 Atl. Rep. 103). See opinion for review of authorities.

Sec. 299. Vested remainders. The law favors vested rather than contingent remainders. *Grimmer* v. *Friederich*, 164 Ill. 245 (45 N. E. Rep. 498); *Bigley* v. *Watson*, 98 Tenn. 358 (39 S. W. Rep. 525; 38 L. R. A. 679). For the application of this principle to particular case, see *McConnell* v. *Stewart*, 169 Ill. 374 (48 N. E. Rep. 201). A remainder limited to a class, vests in such as are in being, subject to open up and let in those afterwards born. *Lariverre* v. *Rains*, 112 Mich. 276 (70 N. W. Rep. 583). The words "from and after," or like expressions, as relating to the termination of life estates do not postpone the vesting of estates in remainder until the death of the life tenant, but rather refer to the period when the remaindermen become entitled to the estates in possession. *Corse* v. *Chapman*, 153 N. Y. 466 (47 N. E. Rep. 812); *Hersee* v. *Simpson*, 154 N. Y. 496 (48 N. E. Rep. 890. Where there is a devise to one for life and after his death "to his lawful child or children and their heirs and assigns," upon the birth of a child to him the remainder vests although subject to be divested by a subsequent contingency. *Hinkson* v. *Lees*, 181 Pa. St. 225 (37 Atl. Rep. 333). Where a testator devised a life estate to his wife and provided that from and after her decease the property should be disposed of according to the laws of the state of New York governing the descent of real property, it is held that persons who are the heirs of the testator at the time of his death, take vested remainders in the property. *Hersee* v. *Simpson*, 154 N. Y.

496 (48 N. E. Rep. 890). In Illinois it is held that a devise to the testator's executor "for the benefit of P. and my son J., for them and their children should they have any," gives each of the devisees an undivided half of the property, and a remainder in fee vests in their children at the time of their birth. *Barclay* v. *Platt*, 170 Ill. 384 (48 N. E. Rep. 972). Where, as a gift, a father conveys land to his wife and causes her to secure the fee to his son by means of a mortgage, the gift is executed and the estate in remainder cannot be divested by any agreement made by husband and wife to which the son is not a party. *Hays* v. *Hays*, 179 Pa. St. 277 (36 Atl. Rep. 311). Where a beneficiary under a deed of trust takes a vested remainder which the trustee is empowered to convey to her whenever she should "be desirous of disposing of her interest in said premises," her estate is alienable and her grantee may maintain ejectment. *Chamberlain* v. *Maynes*, 180 Pa. St. 39 (36 Atl. Rep. 410.) Particular devise held to create a vested remainder. *Nicholson* v. *Cousar*, 50 S. C 206 (27 S. E. Rep. 628).

Sec. 300. Termination of remainder—Impossibility of issue not presumed. Where a life estate is devised to a woman with remainder to her children living at her death, the remainder does not terminate until her death, although all of her children have previously died, when she was advanced in years; as the law does not presume impossibility of issue on account of the advanced age of the first taker. *Bigley* v. *Watson*, 98 Tenn. 353 (39 S. W. Rep. 525; 38 L. R. A. 679). The court say: "Lord Coke says, 'The law seeth no impossibility of having children' (Co. Litt. 28); and Blackstone says, 'A possibility of issue is always supposed to exist, in law, unless extinguished by the death of the parties, even though the donees be, each of them, an hundred years old.' 2 Bl. Comm. 125. This rule of law has been recognized and applied in several American cases. In *State* v. *Larsh*, 16 N. J. L. 388, the supreme court of New Jersey briefly remarked that 'by the common law the possibility of issue is commensurate with life.' In a comparatively recent case the supreme court of Pennsylvania used this emphatic language, namely; 'This rule has stood the test of

time, and received the sanction of ages. * * * Nature has fixed no certain age, by years, at which a child-bearing capacity shall begin and end. * * * The presumption of law is in favor of issue, notwithstanding advanced age.' *List* v. *Rodney*, 88 Pa. St. 488. This court, in deciding the case of *Garner* v. *Dowling*, 11 Heisk. 52, said: 'It is stated in the bill that Mrs. Garner, (the life tenant) is past the time of life when she may reasonably be expected to bear children; but her age is not shown, and, if it were, in legal contemplation it is not impossible that she may have children, and the contingency is not determined until her death.' See, to same effect, 2 Shars. & B. Lead. Cas. Real Prop. 251–253, citing this case and others."

Sec. 301. Vesting of estates. The law favors the vesting of estates. *Grimmer* v. *Friedcrich*, 164 Ill. 245 (45 N. E. Rep. 498); *Hawkins* v. *Bohling*, 168 Ill. 214 (48 N. E. Rep. 94). Where one to whom land is devised in fee subject to a life estate, survives the testator, the estate becomes vested and is not divested by the devisee's death before the life tenant. *Wheeler* v. *Brewster*, 68 Conn. 177 (36 Atl. Rep. 32). The fact that a disposition over may be defeated by the exercise of a power of sale given to the trustee of the life tenant, does not operate to prevent such disposition from creating a vested equitable interest in the lands. *Hawkins* v. *Bohling*, 168 Ill. 214 (48 N. E. Rep. 94). An imperative power of sale, though it may be an indication of an intention that the estate to which it relates shall not vest until the power is exercised, does not necessarily prevent a vesting, especially when it is apparent, from other provisions of the will creating the power, that it was intended that the estate should vest. *In re Wing's Estate*, 154 N. Y. 313 (48 N. E. Rep. 537).

Sec. 302. Condition precedent. Where a deed, made in consideration of the performance of certain conditions by the grantee, provides that "when these conditions are fully complied with, then this deed is to be in full force and virtue in law, and otherwise null and void," the grantee does not take any title until the conditions are performed, and as against a subsequent grantee of his grantor, he has the burden

of showing his performance of the conditions. *Oakman* v. *Walker*, 69 Vt. 344 (38 Atl. Rep. 63).

Sec. 303. Condition subsequent—Breach. A conveyance upon condition subsequent passes the title to the grantee subject to be divested by failure to perform the condition. *Fritz* v. *Menges*, 179 Pa. St. 122 (36 Atl. Rep. 213). A deed upon condition subsequent, conveys the fee with all its qualities of transmission and the estate continues in the grantee after a breach of condition until defeated by actual entry or by some act equivalent to entry at common law, made for the purpose of claiming a forfeiture by some one having the right to terminate the estate. *Little Falls Water-Power Co.* v. *Belin*, 69 Minn. 258 (72 N. W. Rep. 69). Conditions subsequent are favored rather than conditions precedent. *Congregational Church Bldg. Soc.* v. *Everett*, 85 Md. 79 (36 Atl. Rep. 654; 60 Am. St. Rep. 308). Applying the doctrine that conditions subsequent are not favored, it is held that a stipulation in a deed to a county for full consideration that the land is granted to said county "for a public school house, as the property of the schools of said county and for no other purposes, in fee" does not create a condition subsequent so that a forfeiture may be enforced in case the land is used for any other purpose. *Faith* v. *Bowles*, 86 Md. 13 (37 Atl. Rep. 711; 63 Am. St. Rep. 489). Citing, *Kilpatrick* v. *City of Baltimore*, 81 Md. 179 (31 Atl. Rep. 805; 48 Am St. Rep. 509; 27 L. R. A. 643; See Ballards' Law Real Prop., Vol. IV, § 263); *Barker* v. *Barrows*, 138 Mass. 580; *Wier* v. *Simmons*, 55 Wis. 637 (13 N. W. Rep. 873); *Craig* v. *Wells*, 11 N. Y. 315). Where, upon breach of a condition subsequent an action of ejectment is brought, damages for the unlawful withholding can only be recovered from the time a demand was made and refused, or from the time the action was brought, not from the time the condition was broken. *Little Falls Water-Power Co.* v. *Belin*, 69 Minn. 258 (72 N. W. Rep. 69).

Sec. 304. Condition subsequent—Conveyance in consideration of support. Where the consideration of a conveyance was the grantee's agreement to support the gran-

tor, in which he covenanted to reconvey the premises in case of his default, the grantor is entitled to a specific performance of the covenant for reconveyance is case of such default. *Stamper* v. *Stamper*, 121 N. C. 251 (28 S. E. Rep. 20). If the grantee's promises is to pay one-fourth part of the sum necessary to support the grantor during life, upon his failure to perform his agreement, the deed should not be cancelled, but the amount due the grantor should be enforced as a lien on the land. *Powers* v. *Powers*, Ky. (39 S.W.Rep. 825). See Vendor's lien. But upon breach of a condition to support, a court of equity has power to cancel the conveyance and place the parties in *statu quo*. *Cash* v. *Cash*, Ky. (41 S. W. Rep. 579). In case of breach of the grantee's agreement to support, the grantor should be awarded a judgment for the gross sum in full of all demands for possible future support which should be decreed a lien on the land, and if part of the land has been sold the grantor must first enforce his lien against the portion owned by the grantee. *Tabor* v. *Payne*, Ky. (41 S. W. Rep. 557). Where a mother's conveyance to her daughter, recited as a consideration, payment of a mortgage on the premises and support of the grantor for life by the grantee, it will be construed as a condition subsequent and the grantor may re-enter and re-invest herself with the title if the grantee fails to perform the conditions. *Gilchrist* v. *Foxen*, 95 Wis. 428 (70 N. W. Rep. 585). A grantor in a deed made upon condition that the grantee shall support him, who quits the premises on account of an alleged breach of the condition, is entitled to reasonable time to assert a forfeiture, and he does not waive his right to assert such forfeiture by a subsequent return to the premises and acceptance of support for a time from the grantee. *Dunklee* v. *Hooper*, 69 Vt. 65 (37 Atl. Rep. 225). Where a conveyance of land having a dwelling house thereon was made in consideration of the grantee's agreement to live with and care for the grantors during their lives, the removal of the grantors to a cottage which they built near by in order to add to their convenience and comfort, does not necessarily show an abandonment of the contract or a failure of consideration. *Chase* v. *Chase*, 20 R. I. 202 (37 Atl. Rep. 804). Where a son acquired a conveyance of land from his parents under an agreement to support

them during life, after the death of his father, succeeded in effecting a sale of the premises, the proceeds to be applied to the discharge of the mortgage debt existing against his other real estate, afterwards failed to contribute any to the support of his mother, it is held that upon his death, she can, as against creditors, who do not become such on the faith of such mortgage being discharged, revive it for the purpose of securing a prior claim against his estate for an amount of money equal to the proceeds of her lands which were used in its discharge, such money to be applied as needed for her support, the balance to go to his estate. *Bourne* v. *Bourne*, 69 Vt. 251 (37 Atl. Rep. 1049). A mother having a right to enforce a covenant for a reconveyance against her son to whom she has conveyed land, in consideration of his agreement to support her, does not waive this right by permitting him to live with her on the land and caring for him during his last sickness. *Stamper* v. *Stamper*, 121 N. C. 251 (28 S. E. Rep. 20).

Sec. 305. Perpetuity defined. The rule against perpetuities is not violated by a deed of trust which vests the legal estate in the trustee with full power of sale and conveyance and in which the beneficial or equitable estate is reserved to the grantors who have power to make a complete revocation of the trust at any time. *Pulitzer* v. *Livingston*, 89 Me. 359 (36 Atl. Rep. 635). In defining a perpetuity the court say: "It is the grant of property wherein the vesting of an estate or interest, is unlawfully postponed. The law allows the vesting of an estate or interest, and also the power of alienation, to be postponed for the period of a life or lives in being and twenty-one years and nine months thereafter; and all restraints upon the vesting that may suspend it beyond that period are treated as perpetual restraints, and void, and estates or interests which are dependent upon them are void. Nothing is denounced as a perpetuity that does not trangress this rule; and equity follows this rule by way of analogy in dealing with executory trusts; and those trusts which transgress the rule are called 'transgressive trusts,' being, in equity, the substantial equivalent of what in law are called 'perpetuities.' Fearne Rem. 538, note. 'But the limitation, in order to be valid, must be so made that the estate, or

whatever is devised or bequeathed not only may, but must necessarily, vest within the prescribed period. If by any possibility the vesting may be postponed beyond this period, the limitation over will be void.' *Fosdick* v. *Fosdick*, 6 Allen 41; *Square Church* v. *Grant*, 8 Gray 142. Lewis in his work on Perpetuities gives the following as an accurate definition of a perpetuity: 'A perpetuity is a future limitation, whether executory or by way of remainder, and of either real or personal property, which is not to vest until after the expiration of, or will not necessarily vest within, the period fixed and prescribed by law for the creation of future estates and interests, and which is not destructible by the persons for the time being entitled to the property subject to the future limitation, except with the concurrence of the individual interested under that limitation.' The rule against perpetuities has no application to vested estates or interests. Gray, Perp., § 205. It concerns itself only with the vesting—the commencing—of estates, and not at all with their termination. It makes no difference when such a vested estate or interest limited terminates. *Routledge* v. *Dorril*, 2 Ves. Jr. 866; *Evans* v. *Walker*, 3 Ch. Div. 211; *Hampton* v. *Holman*, 5 Ch. Div. 183. See 14 Am. Law Rev. 237."

Sec. 306. Perpetuities—Particular cases. A stipulation in a will, providing for the sale of certain lands, the investment of the proceeds thereof, and the apportionment of the income therefrom, among the testator's children, and which authorizes the probate judge to appoint an executor "from time to time for all time to come," without making any provision for the lands or proceeds arising from their sale to become vested in any one, is void as it creates a perpetuity. *Bigelow* v. *Cady*, 171 Ill. 229 (48 N. E. Rep. 974; 63 Am. St. Rep. 230). Cal. Civ. Code, § 715, providing that "the absolute power of alienation cannot be suspended by any limitation or condition whatever for a longer period than during the continuance of the lives of persons in being at the creation of the limitation or condition," is held to render void any provision which countenances the suspension of alienation for any fixed period of years not depending upon the duration of life; since during the time of such limitation, however short,

the persons capable of conveying the interest, might die. *Crew* v. *Pratt*, 119 Cal. 139 (51 Pac. Rep. 88). Substantially the same is held in, *In re Cavarly's Estate*, 119 Cal. 406 (51 Pac. Rep. 629). Construing and applying How. Ann. Mich. Stat. § 5531, providing that "the absolute power of alienation shall not be suspended by any limitation or condition whatever, for a longer period than during the continuance of two lives in being at the creation of the estate," it is held that where a testator devised a life estate to his wife and gave the remainder to the State of Michigan upon condition that "if the state shall, within the period of five years from and after the death of my said wife, formally accept of this provision of my will, and, by due enactment locate upon my real estate in said township of Grattan, some public educational or charitable institution, and building thereon suitable buildings for such institution," such latter clause is void. The court holds that the state could acquire no title until it complied with the condition precedent, and that for five years the title might be left in abeyance, and, as the power of alienation is not based on lives, the clause of the will must be held void. Under the statute the period of suspension of alienation cannot be measured by time alone, but life must in some form be the measure of the period of suspension. *State* v. *Holmes*, 115 Mich. 456 (73 N. W. Rep. 548). If the contingency upon which the vesting of the fee depends must happen within twenty-one years after a life in being at the time of the testator's death, the rule is not violated no matter how many preceding estates are provided for. *Madison* v. *Larmon*, 170 Ill. 65 (48 N. E. Rep. 556; 62 Am. St. Rep. 356). The rule against perpetuities is not violated by a devise to a charitable institution which requires "as a condition of the vesting of this legacy" that the devisee shall release all obligations it holds against a certain church, *Congregational Church Bldg. Soc.* v. *Everett*, 85 Md. 79 (36 Atl. Rep. 654; 60 Am. St. Rep. 308); nor by a devise to executors in trust, to pay the net income to the testator's daughters for life, with direction that at their decease it should be equally divided among their children who may be then living and the issue of any deceased child or children whether named in the will or not as they arrive at legal age. *In re Siddall's Estate*, 180 Pa. St. 127

(36 Atl. Rep. 570). Particular devise held not to create a perpetuity. *In re Well's Estate*, 69 Vt. 388 (38 Atl. Rep. 88). For particular devise held to create a perpetuity, see *Fargo* v. *Squiers*, 154 N. Y. 250 (48 N. E. Rep. 509). For application of the rule to charitable bequests, see *Ingraham* v. *Ingraham*, 169 Ill. 432 (48 N. Rep. 561).

Sec. 307. **Merger.** A conveyance by the tenant by the curtesy to the tenant in reversion merges the life estate in the fee. *Lineberger* v. *Newkirk*, 179 Pa. St. 117 (36 Atl. Rep. 198). An absolute conveyance taken by a lienholder, will not operate as a merger to the injury of his rights as such, unless a clear intention on his part for it to do so is shown. *Bemis* v *First Nat. Bank*, 68 Ark. 625 (40 S. W. Rep. 127). A married woman may purchase or take the transfer of a debt secured by mortgage upon the real estate of her husband, and in which she may have inchoate rights, and hold the same against her husband, without a merger of the debt in any superior title of herself and husband. *Dyer* v. *Dean*, 69 Vt. 370 (37 Atl. Rep. 1118).

Sec. 308. **Merger—Conveyance taken by lienholder.** A mortgagor's conveyance of the mortgaged premises to the mortgagee does not create a merger of the mortgage as against a prior assignee thereof. *Curtis* v. *Moore*, 152 N. Y. 159 (46 N. E. Rep. 168). Where the holder of mortgages which have priority over a claim of homestead takes a conveyance of the fee, the mortgages will not be held to merge in the deed so as to make them subject to the intervening homestead lien. *Davis* v. *Randall*, 117 Cal. 12 (48 Pac. Rep. 906). Where property subject to two mortgages is conveyed by the mortgagor to the holder of the first mortgage, there is no merger, and the grantee has a right to be protected by his mortgage, against the junior mortgage. *Hitchcock* v. *Nixon*, 16 Wash. 281 (47 Pac. Rep. 412). Where, after reentry by a grantor, for breach of condition subsequent, a mortgagee of the grantee purchases such grantor's title, it is held that by a subsequent foreclosure of his mortgage with intent to perfect his title of record, his right under the mortgage did not become merged in the title acquired from the grantor. *Gilchrist* v. *Foxen*, 95 Wis. 428 (70 N. W. Rep. 585).

ESTOPPEL.

EPITOME OF CASES.

Sec. 309. Estoppel by deed—Particular cases. One who, in a representative capacity, assumes to sell and convey to another the entire estate in the land, is estopped, as against the purchaser, from asserting an estate in his own right in the same land; and this although the first sale and deed were void. *Wills* v. *Steckelberg*, 52 Neb. 597 (72 N. W. Rep. 865; 66 Am. St. Rep. 529). If a trustee having the legal estate, diverts it by deed in due form, he cannot, in a court of law, deny the title so created. *City of Perth Amboy* v. *Ramsay*, 60 N. J. L. 1 (37 Atl. Rep. 446). A trustee who incorporates a personal covenant into a deed which he makes as trustee, estops himself to afterwards claim the land. *Hitchcock*, v. *Southern Iron & Timber Co.*, Tenn. (38 S. W. Rep. 588). One claiming title to land under a county, is estopped to deny the power of the county to acquire title to land. *Jefferson Co.* v. *Grafton*, 74 Miss. 485 (21 So. Rep. 247; 60 Am. St. Rep. 516; 36 L. R. A. 798). One who, in dealing with a foreign corporation, borrows its money and secures the loan by a deed to realty containing a power of sale, is estopped from denying the right of such corporation to have this power conferred upon it or to exercise the same when conferred. *Ray* v. *Home & Foreign Inv. & A. Co.*, 98 Ga. 122 (26 S. E. Rep. 56). The grantee of a mortgagor is not estopped by any covenant made by the latter to the mortgagee, and may connect himself with the paramount title and set up the same to defeat the mortgage. *Preiner* v. *Meyer*, 67 Minn. 197 (69 N. W. Rep. 887). A deed by a mortgagee of land, purchased by him at a void foreclosure sale, which purports to convey only the legal title to the land, estops him from claiming as against his grantee, that the mortgage did not pass by the deed, in a subsequent action by the mortgagor to set aside the decree of foreclosure and payment into court of

the sum due on the mortgage. *Smithson Land Co.* v. *Brautigam*, 16 Wash. 174 (47 Pac. Rep. 434). Where a grantor conveys premises upon which there is an existing mortgage, which the grantee assumes and agrees to pay, and the amount of which is deducted from the consideration, he is not estopped by his covenant of warranty, from subsequently taking an assignment of such mortgage and enforcing the same against the property. *Hamill* v. *Inventors' Mfg. Co.*, 55 N. J. Eq. 649 (37 Atl. Rep. 778). Where one conveys land near the end of a street with reference to its extension over adjacent lands which he then owns, which extension all the parties at the time fully expect will be made, he and his privies will be estopped from subsequently denying to the grantee a right of way over the land which would be included in the extended street. *Seibert* v. *Graff*, N. J. Eq. (38 Atl. Rep. 970).

A husband who joins and authorizes his wife in the execution of a mortgage on her separate property is estopped to defend against the enforcement of the mortgage on account of the want of her authority to execute it. *Joubert* v. *Sampson*, 49 La. 1002 (22 So. Rep. 203). A husband mortgaging his wife's land as his own is estopped to deny his ownership as against the mortgagee, and so is his wife, where she joined in the mortgage knowing that her husband asserted ownership of her land therein. *Holland* v. *Jones*, 48 S. C. 267 (26 S. E. Rep. 606). Where a wife's conveyance of her land directly to her husband is void, she is not estopped to recover it by her joinder with him in a subsequent conveyance of it to a third person, who pays no consideration but acts as a mere conduit to transfer the title to another in fraud of the wife's rights. *Connar* v. *Leach*, 84 Md. 571 (36 Atl. Rep. 591).

Sec. 310. Title by estoppel—After acquired title—At what time it passes. A warranty deed passes an after-acquired title. *Duffy* v. *White*, 115 Mich. 264 (73 N. W. Rep. 363). One who by his mortgage has covenanted against the existence of prior incumbrances, is estopped, as against one claiming title under such mortgage, to enforce a prior mortgage subsequently acquired by him. *Bradford* v. *Burgess*, 20 R. I. 290 (38 Atl. Rep. 975). Ill. Rev. Stat., ch. 30,

7, providing that where one who has conveyed a fee simple estate in lands in which he held no such estate, subsequently acquires the fee, he shall hold the same in trust for his vendee, is held not to operate against the heirs of such a grantor so as to prevent them from asserting a title which they acquired by inheritance from another after his death and which was never vested in him. *Whitson* v. *Grosvenor*, 170 Ill. 271 (48 N. E. Rep. 1018.

Where an after-acquired title passes to a grantee on account of covenants of warranty in his deed, it passes the instant it is acquired by the grantor. *Baldwin* v. *Root*, 90 Tex. 546 (40 S. W. Rep. 3). The court say: "There is a considerable conflict in the authorities upon the question whether the title acquired by one who had previously conveyed the same land with covenants of warranty vests in the warrantee at the time that such title is subsequently acquired by the warrantor, or gives a right to the warrantee to have the subsequently acquired title transferred to him. This conflict grows largely out of the technical rules of the common law upon the subject of covenants in the different kinds of conveyances, which rules are in force in some jurisdictions, and in others they are not; and the decisions upon this question in the different courts depend largely upon whether the technical rules referred to are observed by the court, or disregarded. In this state the subject is regulated by statute so far as the covenants which the law implies from the use of certain language are concerned. The rule most consistent with our system of laws upon this subject is that when one conveys land by warranty of title, or in such manner as to be estopped to dispute the title of his grantee, a title subsequently acquired to that land by the grantor will pass *eo instanti* to his warrantee, binding both the warrantor and his heirs and subsequent purchasers from either. *Robinson* v. *Douthit*, 64 Tex. 101; *Lindsay* v. *Freeman*, 83 Tex. 259 (18 S. W. Rep. 727); *King* v. *Gilson*, 32 Ill. 348 (83 Am. Dec. 269); *McCusker* v. *McEvey*, 9 R. I. 528 (11 Am. Rep. 295); *Knight* v. *Thayer*, 125 Mass. 35; *Baxter* v. *Bradbury*, 20 Me. 260 (37 Am. Dec. 49); *Douglass* v. *Scott*, 5 Ohio 195; *Carver* v. *Jackson*, 4 Pet. 80; *Clark* v. *Baker*, 14 Cal. 612 (76 Am. Dec. 449); *Gould* v. *West*, 32 Tex. 354; *Paxton* v. *Meyer*, 67 Tex. 96 (2 S. W. Rep. 817)."

Sec. 311. Title by estoppel—After acquired title—Special covenants in quitclaim deeds. Under a quitclaim deed containing a covenant of special warranty "against the lawful claims and demands of all persons claiming by, through, or under" the grantor, a title or interest subsequently acquired by the grantor does not inure to the grantee. *Bennett* v. *Davis*, 90 Me. 457 (38 Atl. Rep. 372). Where the three children of one G. H. O., whom they presume to be dead on account of his absence, by quitclaim deeds partitioned his real estate among themselves, each deed reciting that the grantor "being one of the three heirs of H. G. O." it is held that such recital was not a mere *descriptio personae* of the grantor, but an assertion by such grantor that he was then the heir at law of G. H. O., and the grantors in such deeds are estopped from asserting title to the land which they subsequently acquired by the death of G. H. O. *Hagensick* v. *Castor*, 58 Neb. 495 (78 N. W. Rep. 982). The court cites the case of *Van Rensselaer* v. *Kearney*, 11 How. 297, from which it quotes with approval as follows: "The principle deducible from these authorities seems to be that, whatever may be the form or nature of the conveyance used to pass real property, if the grantor sets forth on the face of the instrument, by way of recital or averment, that he is seised or possessed of a particular estate in the premises, and which estate the deed purports to convey, or, what is the same thing, if the seisin or possession of a particular estate is affirmed in the deed, either in express terms or by necessary implication, the grantor and all persons in privity with him shall be estopped from ever afterwards denying that he was so seised and possessed at the time he made the conveyance. The estoppel works upon the estate, and binds an after acquired title as between parties and privies. The reason is that the estate thus affirmed to be in the party at the time of the conveyance must necessarily have influenced the grantee in making the purchase; and hence the grantor and those in privity with him, in good faith and fair dealing, should be forever thereafter precluded from gainsaying it. The doctrine is founded, when properly applied upon the highest principles of morality, and recommends itself to the common sense and justice of every one. Although it debars the truth in the particular case, and therefore is not

unfrequently characterized as odious, and not to be favored, still it should be remembered that it debars it only in the case where its utterance would convict the party of a previous falsehood,—would be the denial of a previous affirmation, upon the faith of which persons had dealt and pledged their credit or expended their money. It is a doctrine therefore, when properly understood and applied, that concludes the truth in order to prevent fraud and falsehood, and imposes silence on a party only when, in conscience and honesty, he should not be allowed to speak."

Sec. 312. Recitals in deeds—Covenant assuming payment of debt. One who bases his rights upon an estoppel by a recital in a deed must show that he acted upon the strength and faith of such recital to his detriment. *Bisbee* v. *Carey*, 17 Wash. 224 (49 Pac. Rep. 220). One who founds his right to land upon an instrument which admits title in a certain person and which does not purport to be executed by or on behalf of such person, is estopped to deny the title of a grantee of such person. *Dederick* v. *Alexander*, 58 Kan. 56 (48 Pac. Rep. 594). The mere fact that a grantor, in a conveyance of a family homestead, is described therein as a single person, will not estop the grantor from asserting the homestead character of the premises included in the conveyance, or the right of homestead therein, as against a grantee or mortgagee. *France* v. *Bell*, 52 Neb. 57 (71 N. W. Rep. 984). A grantee's covenant in a deed to assume and pay an existing lien, estops him from questioning its validity. *Michigan Sav. & Loan Ass'n* v. *Attebery*, 16 Tex. Civ. App. 222 (42 S. W. Rep. 569). Citing, 1 Beach, Mod. Eq. Jur., § 455; 1 Jones, Mortg., § 744; *Dean* v. *Walker*, 107 Ill. 540 (47 Am. Rep. 467); *Foster* v. *Wightman*, 123 Mass. 100; *Freeman* v. *Auld*, 44 N. Y. 52; *Pidgeon* v. *Trustees*, 44 Ill. 501; *Crawford* v. *Edwards*, 33 Mich. 354; *Parkinson* v. *Sherman*, 74 N. Y. 86 (30 Am. Rep. 268); *Shepherd* v. *May*, 115 U. S. 505 (6 Sup. Ct. Rep. 119); *Moore's Appeal*, 88 Pa. St. 450 (32 Am. Rep. 469); *Association* v. *Bostwick*, 100 N. Y. 628; *Chadwick* v. *Beach Co.*, 43 N. J. Eq. 616 (12 Atl. Rep. 880); *Dean* v. *Walker*, 107 Ill. 544; *Miller* v. *Thompson*, 34 Mich. 10; *Manwaring* v. *Powell*, 40 Mich. 374; *Tanguay* v.

Felthousen, 45 Wis. 80; *Hancock* v. *Fleming*, 108 Ind. 588 (8 N. E. Rep. 254).

Sec. 313. Estoppel in pais—General principles. One cannot estop himself to prove facts which show a contract to which he is not a party to be opposed to law or public policy. *White* v. *Brown*, Ind. Ter. (38 S. W. Rep. 835). In the absence of fraud there can be no estoppel as to matters contained in a public record equally open to both parties. *Jameson* v. *Rixey*, 94 Va. 342 (26 S. E. Rep. 861; 64 Am. St. Rep. 726). The grantee of one who is estopped to assert title in real estate, as against one who purchased in reliance upon his disclaimer of any interest therein, is bound by such estoppel. *Stivers* v. *Gardner*, 101 Ia. 85 (69 N. W. Rep. 1140). The rule that an estoppel must be pleaded, cannot be invoked for the first time on appeal by one who has acquiesced in the admission of evidence concerning the estoppel, without such special plea. *Price* v. *Hallett*, 138 Mo. 561 (38 S. W. Rep. 451). For a discussion of the principles of estoppel *in pais*, see *Williamson* v. *Jones*, 43 W. Va. 652 (27 S. E. Rep. 411; 64 Am. St. Rep. 891; 38 L. R. A. 694); *Bristol-Goodson Elec. L. & P. Co.* v. *Bristol Gas E. L. & P. Co.*, 99 Tenn. 371 (42 S. W. Rep. 19).

There can be no estoppel unless the party relying on the estoppel has been injured on account of such reliance. *Raney* v. *Hines*, 120 N. C. 376 (27 S. E. Rep. 92). To bind one by estoppel *in pais* from statement or conduct, he must have stated, or led another to believe in, something as a fact, and that other must be ignorant of the contrary, and must rely on it, and act to his injury differently from what he would have done but for such statement or conduct. *Bettman* v. *Harness*, 42 W. Va. 433 (26 S. E. Rep. 271; 36 L. R. A. 566). An estoppel is worked, not because the loss to the party injured was a succeeding event to the act or omission of the party to be estopped, in dealing with the subject-matter of the transaction, but because the act or omission of the party to be estopped was the moving cause which led to the party injured to do the act resulting in the loss. There must have been a relation of cause and effect, by which the injury and consequent loss to the injured party were the result of previous

misconduct of the party to be estopped. The party setting up an estoppel must show that he relied on and was misled by the conduct imputed to the party to be estopped. *Mott* v. *German Hospital*, 55 N. J. Eq. 722 (37 Atl. Rep. 757).

Sec. 314. Estoppel in pais—Accepting benefits. Where pending the erection of improvements thereon, a landowner conveys land to his bookkeeper, who does not record her deed, but continues to superintend improvements without giving notice of her title, she is estopped to deny the right of the contractors to enforce mechanics' liens. *Phillips* v. *Browne*, 20 R. I. 79 (37 Atl. Rep. 490). A creditor who accepts payment of a mortgage from a subsequent grantee of premises, fraudulently conveyed by his grantor, is not estopped from attacking the conveyance as fraudulent. *Arnold* v. *Hoschildt*, 69 Minn. 101 (71 N. W. Rep. 829).

Sec. 315. Estoppel in pais—Silence when one should speak. One's silence will not estop him merely because he had an opportunity to speak; he must be placed in a position where it is his duty to speak. *Simpson* v. *Biffle*, 68 Ark. 289 (88 S. W. Rep. 845). One cannot lose his title to real estate on account of silence or admissions occurring when he was ignorant of his rights. *Collins* v. *Williams*, 98 Tenn. 525 (41 S. W. Rep. 1056); *Hayes* v. *Hayes*, 179 Pa. St. 277 (36 Atl. Rep. 311). Nor can the right to redeem be lost by such silence. *Wood* v. *Holland*, 64 Ark. 104 (40 S. W. Rep. 704). Where one of several claimants of land acted as a conveyancer between two others and failed to assert at the time a different title to the land which they thought was being conveyed, he will be estopped to subsequently urge such title against them. *Price* v. *Hallett*, 138 Mo. 561 (38 S. W. Rep. 451). A grantee in a deed who fails to assail the validity of conditions in it, imposing obligations on him, for a considerable length of time after he has notice of them, will be estopped by his silence to question their validity. *Sutter* v. *Rose*, 169 Ill. 66 (48 N. E. Rep. 411). If one knowingly, though he does it passively, by looking on, suffers another to purchase and expend money on land under an erroneous opinion of title without making known his claim, he shall not afterwards be

permitted to exercise his legal right against such person. *Hagan* v. *Ellis*, 39 Fla. 468 (22 So. Rep. 727; 63 Am. St. Rep. 167). See opinion for application of this doctrine to particular state of facts. Where one holding title merely to protect his grantor's property from certain proceedings against him, acquiesces in his grantor's conveyance of the property to another he is estopped from questioning the latter's title. *Hendricks* v. *Edmiston*, 15 Wash. 687 (47 Pac. Rep. 29). Mere failure of an owner to assert his title for a long period of time, will not estop him from maintaining an action against one claiming under a void tax deed, whose posssession has never ripened into a title by prescription and is not protected by any statute of limitations. *Marysville Inv. Co.* v. *Holle*, 58 Kan. 778 (51 Pac. Rep. 281). One who, by duly recorded conveyance, clothes another with apparent absolute title to his land, is estopped to deny such title as against the grantee's creditors who have extended credit to him on the faith of his ownership. *Greer* v. *Mitchell*, 42 W. Va. 494 (26 S. E. Rep. 302). Where an officer conducting a sale of land, executed deeds to persons whom he believed to be the vendees of the purchaser, the purchaser acquiescing for several years in their holding title and conveying the lots is estopped to afterwards set up a claim of ownership of them. *Williams* v. *Reynolds*, Va. (27 S. E. Rep. 600).

Where the owner of property subject to assessment for public improvements stands by and makes no objection to such public improvements, which benefit his property, he may not deny the authority by which the improvements are made or defeat the assessment made against his property for the benefits derived; and this is true both where the proceedings for the improvement are attacked for irregularity and where their validity is denied, but color of law exists for the proceedings. *Board Com'rs* v. *Plotner*, 149 Ind. 116 (48 N. E. Rep. 685). An owner of property abutting on a street is not estopped from maintaining trespass against a city for the destruction of a wall thereon, on the ground that it was an obstruction to the street, because he made no objections to the proceedings establishing the street, had more than ten years previous. *Keifer* v. *City of Bridgeport*, 68 Conn. 401 (36 Atl. Rep. 801). A wife, who does not join her husband in a conveyance

of his land, is not estopped to assert after his death, her title to one-third of it, by the mere fact that she knew of the sale and that the purchaser was in possession of the land and made no objection thereto during coverture. *Madson* v. *Madson*, 69 Minn. 37 (71 N. W. Rep. 824). Where a widow has knowledge of her husband's previous recorded conveyance of land in which she did not join, and which falsely recited that he was unmarried, for thirteen years remained silent and asserted no title as against his innocent grantee who made improvements increasing the value of the land ten-fold, she was held estopped by her conduct from asserting any title to the premises. *Holcomb* v. *Independent School Dist.*, 67 Minn. 321 (69 N. W. Rep. 1067).

Sec. 316. Estoppel in pais—Particular cases. Where a purchaser's note given for the purchase price for an interest in mortgaged land has not been paid, he is estopped to claim the benefits of the covenant of warranty in his deed as relieving his property from the mortgage. *Truss* v. *Miller*, 116 Ala. 494 (22 So. Rep. 868). The holder of two recorded mortgages is not estopped from enforcing the second upon assignment of the first where there is no fraud or concealment. *Hussey* v. *Hill*, 120 N. C. 312 (26 S. E. Rep. 919; 58 Am. St. Rep. 789.) One who induces another to make a loan to, and take a mortgage from, a third party, on land, the description of which he furnishes, is estopped to claim a part of such land as his own and dispute the mortgage to that extent. *East Greenwich Inst. for Sav.* v. *Kenyon*, 20 R. I. 110 (37 Atl. Rep. 632). Where the real owners of property permit the title thereof to be taken in the name of another, they are estopped to deny a valid dedication of a part of it to public use made by him. *Sweatman* v. *City of Deadwood*, 9 S. Dak. 380 (69 N. W. Rep. 582). A plaintiff who causes, under an execution in his favor, a sale of property by an officer authorized to sell, is, as against a *bona fide* purchaser at such sale, except for the purpose of maintaining petition to set the sale aside, founded upon facts equitably entitling him to such relief, estopped to deny either the validity of the process, the regularity of its issue, or the lawfulness of the sale. *Lynn* v. *New England Mortg. Sec. Co.*, 98 Ga.

442 (26 S. E. Rep. 750). Where a vendor of land advised a third person to purchase the same at a foreclosure sale under a trust deed given by his vendee, he will be estopped to assert, as against such purchaser, the right to rescind the title of the vendee on account of fraud. *Boles* v. *Bennington*, 136 Mo. 522 (38 S. W. Rep. 306). One who purchases land expressly subject to a void lease, the consideration for which is the erection of certain improvements on the land by the lessee, will be held estopped to assail the validity of the lease and deprive the lessee of his possession after he has performed his part of the agreement. *Poplin* v. *Clausen*, Ind. Ter. (38 S. W. Rep. 974).

As against a purchaser of a mining claim, the owner of an adjoining claim is estopped to deny a boundary line which he represented to such purchaser before he made his purchase as the dividing line between the claims. *Schultz* v. *Allyn*, Ariz. (48 Pac. Rep 960). Where one party to a contract for the sale of lands which specifies a fence as a line, immediately after the execution of the contract surveys the lines fixing a certain fence as the one referred to in the contract, he cannot, after the death of the other party to the contract give evidence denying the fixing of that fence as the line. *Anderson* v. *Jarrett*, 43 W. Va. 246 (27 S. E. Rep. 348). A prior appropriator of a water right in full enjoyment of his completed appropriation is not estopped to assert it, as against one having full knowledge of his claim, by his inducing the latter to purchase land in his vicinity and representing to him that the waters of the stream would be sufficient to satisy the needs of them both. *Smyth* v. *Neal*, 31 Or. 105 (49 Pac. Rep. 850). An abutting owner who has recovered and accepted damages on account of the appropriation of his property by a city for a public street, cannot afterwards question the easement of the public in such street in order to defeat an assessment made against him for its improvment. *Hawver* v. *City of Omaha*, 52 Neb. 734 (73 N. W. Rep. 217). Where an expensive viaduct was constructed by a city, which, with the knowledge, acquiescence and oral consent of a property owner extended a few inches over upon his property, where it was maintained for about five years before complaint was made by him, it is held that such owner

is estopped from claiming exclusive possession of the ground so occupied or from interfering with the maintenance of such structure. *Parker* v. *City of Atchison*, 58 Kan. 29 (48 Pac. Rep. 631). For particular fact case illustrating the application of the doctrine of estoppel *in pais*, see *Beede* v. *Pabody*, 70 Minn. 174 (72 N. W. Rep. 970). Ga. Code, § 3753, construed and applied—estoppel *in pais*. *Henry* v. *McAllister*, 99 Ga. 557 (26 S. E. Rep. 469).

Sec. 317. Estoppel as applied to the public. A city which has acquired by prescription the right to use land for an alley is not estopped to claim the right to use all of such land for alley, by its abandonment of subsequent proceedings to assess abutting property for the improvement of such alley upon objections being filed which dispute the right of the city to use part of the land for an alley. *City of Chicago* v. *Sawyer*, 166 Ill. 290 (46 N. E. Rep. 759). Where a city acquiesces in a boundary of a street, as claimed by a lot owner, for more than thirty years, improves the street and sidewalk in reference thereto, and permits the owner to erect his buildings and fences according to it, it will be estopped to dispute such boundary and claim a part of the lot occupied by the owner's buildings as belonging to the street. *City of Joliet* v. *Werner*, 166 Ill. 84 (46 N. E. Rep. 780).

An evident and notorious abandonment of a public road or alley, and the physical closing thereof with the knowledge of the municipal authorities, on the faith of which private parties have expended money in improvements, constitutes an estoppel against the reassertion of the public easement. *Baldwin* v. *Trimble*, 85 Md. 396 (37 Atl. Rep. 176; 36 L. R. A. 489); *Jordan* v. *City of Chenoa*, 166 Ill. 530 (47 N. E. Rep. 191). In the first case cited the court say: "There is a line of cases proceeding upon the maxim, '*Nullum tempus occurrit regi*,' which holds that the rights of the public to a street or thoroughfare cannot be barred by nonuser, and that every act of asserted ownership, such as occupancy, hostile to the public use, is a nuisance, which can never ripen into a private right by mere efflux of time; while another series of cases, founded on the assumption that limitations run against the state, or else that the maxim above cited does not apply to municipali-

ties, holds that the same acts of adverse user and possession which would extinguish a private easement will likewise destroy the easement of the public in a street or highway. The precise question, as we now have it presented, has not heretofore arisen in Maryland,—at least, our investigations have not discovered, nor have counsel in their arguments referred us to, any adjudication thereon,—though there are three cases decided by this court which explicitly hold that no right to maintain a public nuisance in the form of an encroachment on the highway can be acquired by prescription. To these cases we shall have occasion to allude in a moment. In California, Louisiana, Mississippi, New Jersey, New York, Pennsylvania, and some other states it has been held that the right of the public to the use of a highway cannot be lost by mere nonuser or lapse of time, though coupled with occupancy by individuals for purposes other than and inconsistent with those of a thoroughfare; and the doctrine, in its broad terms, is maintained in many opinions of great force. *People* v. *Pope*, 53 Cal. 437; *Orena* v. *City of Santa Barbara*, 91 Cal. 621 (28 Pac. Rep. 268); *Mayor etc. of Thibodeaux* v. *Maggioli*, 4 La. Ann. 73; *City of Vicksburg* v. *Marshall*, 59 Miss. 563; *Mayor etc. of Jersey City* v. *Morris Canal & Banking Co.*, 12 N. J. Eq. 547; *Burbank* v. *Fay*, 65 N. Y. 57; *Com.* v. *Moorehead*, 118 Pa. St. 344 (12 Atl. Rep. 424; 4 Am. St. Rep. 599). On the other hand in Arkansas, Illinois, Kentucky, Massachusetts, Michigan, Missouri, Vermont, and other states, the converse is asserted; and it is held that notorious and uninterrupted possession by a private individual, under a claim of right of land dedicated to a city for public streets, for the period of the statute of limitations, will bar the city to claim its use. *Ft. Smith* v. *McKibbin*, 41 Ark. 45 (48 Am. Rep. 19); *City of Peoria* v. *Johnston*, 56 Ill. 45; *Dudley* v. *Trustees of Frankfort*, 12 B. Mon. 610; *Cutter* v. *Cambridge*, 6 Allen 20; *Gregory* v. *Knight*, 50 Mich. 61 (14 N. W. Rep. 700); *St. Charles Co.* v. *Powell*, 22 Mo. 525 (66 Am. Dec. 637); *Cincinnati* v. *Evans*, 5 O. St. 594; *Knight* v. *Heaten*, 22 Vt. 481. This subject is ably and elaborately discussed, and the adjudged cases are collected and classified in a learned and carefully prepared note to *Maire* v. *Kruse*, 85 Wis. 302 (55 N. W. Rep. 389; 26 L. R. A. 449). The second of these

conflicting propositions is not only not sustained by any adjudication in Maryland, but is directly in antagonism to what we apprehend to be the law of this state; while the first is wholly inapplicable to the case at bar, for the simple reason that the title of the appellant to the road does not depend on prescription as against the public, but upon his deeds and the fact of an abandonment of the public easement, whereby the rights of the public over the road were extinguished. While an encroachment on a highway is conclusively settled in Maryland to be a public nuisance, which can never grow by prescription into a private right (*Philadelphia W. & B. R. Co.* v. *State*, 20 Md. 157; *Northern Cent. Ry. Co.* v. *Mayor etc. of Baltimore*, 21 Md. 93; *Ulman* v. *Avenue Co.*, 88 Md. 130 (34 Atl. Rep. 366), yet it may be true and in perfect harmony and accord with that doctrine, that cases concerning public streets can arise of such a character, and be founded upon such an actual and notorious abandonment of the highway by the public, that justice requires that an equitable estoppel shall be asserted even against the public in favor of individuals. In that event, such cases, as observed by Judge Dillon, 'will form a law unto themselves,' and will not fall within the legal operation of limitation enactments. * * * 'There is no danger,' he continues 'in recognizing the principle of an estoppel *in pais* as applicable to such cases, as this leaves the court to decide the question, not by the mere lapse of time, but by all the circumstances of the case, to hold the public estopped or not, as right and justice may require.' 2 Dill. Mun. Corp. (2d Ed.), § 533. And this proposition is supported by *Goodrich* v. *Milwaukee*, 24 Wis. 422; *Lane* v. *Kennedy*, 18 O. St. 42; *Com.* v. *Miltenberger*, 7 Watts 450; *Logan Co. Sup'rs* v. *City of Lincoln*, 81 Ill. 156; *Piatt Co.* v. *Goodell*, 97 Ill. 84; *Simplot* v. *Railroad Co.*, 16 Fed. Rep. 350; and, while not decided, is implied in *Mayor etc. of Baltimore* v. *Frick*, 82 Md. 86 (33 Atl. Rep. 435)."

EVIDENCE.

EPITOME OF CASES.

Sec. 318. Admissibility of deeds—Altered deeds. An altered instrument may be admitted in evidence upon proof of its execution. *Cosgrave* v. *Fanebust*, 10 S. Dak. 218 (72 N. W. Rep. 469). When erasures appear upon a deed in a material part, it is improper to admit it in evidence without an explanation thereof by the parties offering it. *Riseden* v. *Harrison*, Tenn. (42 S. W. Rep. 884). An alteration made by a vendee in a memorandum of sale after it has been signed, by which, if valid, its scope, as evidence against the vendors, would be enlarged, is a material alteration, and annuls the instrument as a contract and as evidence, in favor of the vendee. *Quinzel* v. *Schmidt*, N. J. L. (38 Atl. Rep. 665). An appellate court cannot determine that a lower court erred in admitting a deed in evidence on account of supposed interlineations where the record contains neither the original deed nor any description of the supposed interlineations. *Ward* v. *Cheney*, 117 Ala. 238 (22 So. Rep. 996). The court say: "The mere fact that alterations or erasures or interlineations are apparent on the face of a deed does not destroy its validity. The effect of them, ordinarily, depends upon extrinsic evidence, and is incapable of determination upon a motion to exclude the deed as an instrument of evidence. *Ravisies* v. *Alston*, 5 Ala. 297. If apparent on the face of the deed, and nothing appears to the contrary, the presumption is that they were made contemporaneously with the execution of the instrument. But, if any ground of suspicion is apparent upon the face of the instrument, the law presumes nothing; it leaves the question of the time, the agency, and the intent with which they were made, as matters of fact to be determined by the jury. 1 Greenl. Ev., § 564; 1 Whart. Ev., § 629."

Sec. 319. Admissibility of deeds—Proof of execution—Ancient deeds and deeds without a stamp. In Alabama it is held that where one of the witnesses to a deed is proven to be dead and the signature of the other witness who resided out of the jurisdiction of the court is clearly proved, the execution of the deed is sufficiently shown to admit it in evidence. *Smith* v. *Keyser*, 115 Ala. 455 (22 So. Rep. 149). Construing How. Ann. Mich. Stat., § 5685, which makes a certified transcript of the record of a deed sufficient proof of the execution and delivery of it, it is held that if the original deed have endorsed upon it the certificate of the register that it was duly recorded, it is admissible in evidence without further proof of its execution. *Webb* v. *Holt*, 113 Mich. 338 (71 N. W. Rep. 637). When called for, the execution of a deed to a party as grantee must be proved, and in the absence of a statute to that effect the certificates of acknowledgment and registration appearing upon it are not proof of its execution. Me. Rev. Stat. ch. 82, § 110, construed. *Webber* v. *Stratton*, 89 Me. 379 (36 Atl. Rep. 614). In Massachusetts it is held that a deed more than thirty years old, if produced from proper custody, requires no formal proof; and an officer's copy of an ancient recorded deed may be admitted in evidence as if it were the original deed. *New York, N. H. & H. R. Co.* v. *Benedict*, 169 Mass. 262 (47 N. E. Rep. 1027). Act Congress, July 13, 1866, § 168, providing that no deed, instrument, etc., required by law to be stamped, shall be admitted in evidence without being duly stamped, applies only to the courts of the United States and does not bind the state courts. *Trowbridge* v. *Addoms*, 28 Colo. 518 (48 Pac. Rep. 535). For fuller statement of this case see fourth section in chapter on Deeds.

Sec. 320. Parol evidence—Construction of contracts, deeds, etc. Where, in order to determine their meaning, it is necessary to construe two written contracts together, and when so construed there is no ambiguity, parol evidence is inadmissible to aid in their construction. *Harrison* v. *Tate*, 100 Ga. 383 (28 S. E. Rep. 227). Applying the rule that parol evidence is admissible to show the consideration of a deed, it is held that the agreement of the parties to a deed in reference to the payment of incumbrances existing on the land

conveyed, may be shown by parol. *Ford* v. *Savage*, 111 Mich. 144 (69 N. W. Rep. 240); *Clark* v. *Lowe*, 118 Mich. 852 (71 N. W. Rep. 638); *Morgan* v. *South Milwaukee Lake View Co.*, 97 Wis. 275 (72 N. W. Rep. 872). Parol evidence is admissible to show that property not included in a conveyance by its terms is not appurtenant to the property conveyed. *Carman* v. *Staudaher*, 20 Mont. 364 (51 Pac. Rep. 788). Though a mortgage, on its face, is for the payment of a specific sum of money, parol evidence is admissible to show that it was really intended to secure future advances made from time to time. *Johnson* v. *Bratton*, 112 Mich. 319 (70 N. W. Rep. 1021). One asserting that a conveyance made by a parent to a child was intended as an advancement, may show by parol evidence that no consideration was paid for its execution. *Finch* v. *Garrett*, 102 Ia. 381 (71 N. W. Rep. 429). Parol evidence is admissible to show the surroundings and situation of the parties to a deed at the time of its execution. *White* v. *Rice*, 112 Mich. 403 (70 N. W. Rep. 1024). Applying Ia. Code 1873, § 2326, requiring wills to be in writing, it is held that parol evidence is not admissible to show that an absolute devise is to be held in trust for other persons. *Moran* v. *Moran*, 104 Ia. 216 (73 N. W. Rep. 617; 65 Am. St. Rep. 443; 39 L. R. A. 204). Where a mortgagor of land assigned as additional security a lease of the land to another which gave him an option to purchase, and the mortgagee endorsed on the lease that the payment of rents under it should be made to the mortgagor and used and applied as she may deem fit and proper, and that it is further understood that the mortgagee is to have no interest in the purchase money which the lessee might pay, it is held that parol evidence is admissible to show that the mortgagee did not waive the right to have the purchase money applied in payment of the mortgage. *Pennsylvania Mortg. Inv. Co.* v. *Simms*, 16 Wash. 243 (47 Pac. Rep. 441).

Sec. 321. Parol evidence—Contemporaneous agreements—Identifying parties and subject matter. A parol agreement made at the time of the execution of a note secured by a mortgage to the effect that the security should be exhausted before proceeding against the maker, may be shown. *Clinch Val. Coal & Iron Co.* v. *Willing*, 180 Pa. St. 165

(36 Atl. Rep. 737; 57 Am. St. Rep. 626). A verbal contract in direct conflict with a contemporaneous written contract between the parties in inadmissible in evidence to vary the terms of the latter. *Younie* v. *Walrod*, 104 Ia. 475 (73 N. W. Rep. 1021.) When the wording of the lease shows that there are two persons named as lessees, parol evidence is not admissible to show that one was merely acting as surety for the other. *Hobbs* v. *Batory*, 86 Md. 68 (37 Atl. Rep. 718.) Where a conveyance to an intended grantee, designates him by a wrong name, parol evidence is admissible to show that he is the same person who subsequently conveys the property in his right name. *Salmer* v. *Lathrop*, 10 S. Dak. 216 (72 N. W. Rep. 570). As to the admissibility of parol evidence to identify a corporation to whom a devise is made, see *Tilley* v. *Ellis*, 119 N. C. 233 (26 S. E. Rep. 29). Parol evidence is admissible to identify land described in a written contract. Iowa Code 1873, §§ 3663, 3664, applied. *Wilson* v. *Riddick*, 100 Ia. 697 (69 N. W. Rep. 1039).

Sec. 322. Parol evidence—Particular cases. In North Carolina it is held that the law does not allow the title to land to pass by parol contract, and parol evidence offered for such a purpose should be excluded by the court though the parties raise no proper objection. *Presnell* v. *Garrison*, 121 N. C. 366 (28 S. E. Rep. 409; 29 S. E. Rep. 889). In an action by a mortgagee on a grantee's covenant to assume and pay the mortgage debt, evidence to contradict the covenant of assumption is inadmissible, where there was no pleading alleging that it was inserted by fraud or mistake or that the grantee accepted the deed without knowledge of such covenant. *Starbird* v. *Cranston*, 24 Colo. 20 (48 Pac. Rep. 652). Particular case in which secondary evidence was held inadmissible to prove the existence of a lease. *Weiler* v. *Monroe Co.*, 74 Miss. 682 (21 So. Rep. 969).

Sec. 323. Declarations affecting realty interests. Declarations by one in possession accompanying the act of possession, if made in good faith, are admissible to explain the character and extent of his possession. *Ward* v. *Edge*, 100 Ky. 757 (39 S. W. Rep. 440); *High's Heirs* v. *Pancake*,

42 W. Va. 602 (26 S. E. Rep. 536). A grantor's declarations made in disparagement of his title before a conveyance by him, are admissible against his grantee. *Finch* v. *Garrett*, 102 Ia. 381 (71 N. W. Rep. 429); *Mc Curtain* v. *Grady*, Ind. Ter. (38 S. W. Rep. 65). But a grantor's deed cannot be impeached by his inconsistent declarations made long prior to its execution. *Kelley* v. *Perrault*, Idaho (48 Pac. Rep. 45). Declarations of a grantor after delivery of a deed by him are inadmissible to invalidate it. *Shea* v. *Murphy*, 164 Ill. 614 (45 N. E. Rep. 1021; 56 Am. St. Rep. 215). Declarations of one's agent incidentally made, which at most amount to the mere expression of opinion, cannot affect his principal's title. *Humes* v. *Proctor*, 151 N. Y. 520 (45 N. E. Rep. 948). Persons claiming under a deed, for the purpose of showing that it was based upon a valuable consideration, may prove the declarations of the grantor that it did not pay one-half of his debt to the grantee. *Oakman* v. *Walker*, 69 Vt. 344 (38 Atl. Rep. 63). After the death of a surveyor who made a plat, a landowner who is not a surveyor is incompetent to explain lines placed on the plat by his direction, as they are declarations of an interested party. *State* v. *Crocker*, 49 S. C. 242 (27 S. E. Rep. 49). As to the admissibility of the declarations of a deceased owner in reference to his boundary, see *High's Heirs* v. *Pancake*, 42 W. Va. 602 (26 S. E. Rep. 536). Where the issue is as to the location of a way of necessity, made by the servient owner, his declarations to other prospective purchasers of lots who would have occasion to use the way, are admissible. *Jenne* v. *Piper*, 69 Vt. 497 (38 Atl. Rep. 147).

Sec. 324. Opinions — Judicial notice — Presumptions. Opinion evidence is admissible upon a question of value. *Blair* v. *City of Charleston*, 43 W. Va. 62 (26 S. E. Rep. 341; 64 Am. St. Rep. 837; 35 L. R. A. 852). In an action for damages to property on account of the construction of an elevated railway the opinion of a witness as to the damages occasioned to adjacent property cannot be contradicted by proof that the owner of it accepted a less sum in settlement. *Lake Roland Ry. Co.* v. *Weir*, 86 Md. 278 (37 Atl. Rep. 714). The courts of a state will take judicial notice of the officers authorized by it to take acknowledgments in another state.

Fisk v. *Hopping*, 169 Ill. 105 (48 N. E. Rep. 328). A presumption of undue influence arises where, when a lessor and lessee also sustaining the relation of mortgagor and mortgagee, the lessor accepts a return of the premises in a condition inferior to that required by the lease. *Hines* v. *Outlaw*, 121 N. C. 51 (27 S. E. Rep. 1006). The fact that one who has been absent long enough to create a presumption of his death was unmarried when he left the state and was not shown to have been married when last heard from, does not create a presumption that he died childless. *Still* v. *Hutto*, 48 S. C. 415 (26 S. E. Rep. 718).

A presumption of death does not arise from long absence of a person from the place where his relatives reside, but which is not his place of residence, and their failure to receive letters from him for more than seven years. *Hitz* v. *Algreen*, 170 Ill. 60 (48 N. E. Rep. 1068). The court say: "In order to enforce the presumption of death of a person after an absence of seven years, there must be evidence of diligent inquiry at the person's last place of residence, and among his relatives and any others who probably would have heard from him if living. *Hancock* v. *Insurance Co.*, 62 Mo. 26; 2 Greenl. Ev. (15th Ed.), § 278f; *Wentworth* v. *Wentworth*, 71 Me. 72; *Bailey* v. *Bailey*, 86 Mich. 182; *Whiting* v. *Nicoll*, 46 Ill. 233 (92 Am. Dec. 248). Long absence alone, no matter how long continued, is not sufficient of itself to raise a presumption of death. There must be shown an absence of seven years or more from the established residence of the party before the presumption of death can be raised. *Stinchfield* v. *Emerson*, 52 Me. 465 (83 Am. Dec. 524)." Particular evidence held sufficient to create a presumption of death on account of absence from the established residence. *Sherod* v. *Ewell*, 104 Ia. 253 (73 N. W. Rep. 493).

Sec. 325. Competency of witnesses. Where the good faith of a party is at issue, he may testify directly that he acted in good faith. *Hale* v. *Robertson*, 100 Ga. 168 (27 S. E. Rep. 987). Applying Ga. Acts 1885, p. 31, §§ 3837, 3838, it is held that the maker of a deed is a competent witness to prove its execution where the subscribing witness cannot be produced or is unable to remember the transaction.

Kelley v. *William Sharp Saddlery Co.*, 99 Ga. 398 (27 S. E. Rep. 741). Mo. Rev. Stat. 1889, § 8922, which disqualifies a wife from testifying as to "any admission or conversation of her husband whether made to herself or to third parties," does not prohibit a widow from testifying in support of a delivery of deeds to her husband, that she saw the grantor hand to him. *Shanklin* v. *McCracken*, 140 Mo. 348 (41 S. W. Rep. 898). For construction of statutesas to the competency of witnesses concerning transactions with a deceased person, see *Hagan* v. *Powers*, 103 Ia. 593 (72 N. W. Rep. 771), construing Ia. Code 1878, § 3639; *Schmitz* v. *Beals*, 115 Mich. 112 (73 N. W. Rep. 109); *Laird* v. *Laird*, 115 Mich. 352 (73 N. W. Rep. 382), construing and applying 3 How. Ann. Mich. Stat., § 7545; *Madson* v. *Madson*, 69 Minn. 87 (71 N. W. Rep. 824); *Towle* v. *Sherer*, 70 Minn. 312 (73 N. W. Rep. 180), construing and applying Minn. Gen. Stat. 1894, § 5660; *Presnell* v. *Garrison*, 121 N. C. 366 (28 S. E. Rep. 409; 29 S. E. Rep. 389; *Blake* v. *Blake*, 120 N. C. 177 (26 S. E. Rep. 816), construing and applying N. C. Code, § 590; *Paddock* v. *Adams*, 56 O. St. 242 (46 N. E. Rep. 1068), construing and applying Ohio Rev. Stat., § 5242; *Spencer* v. *Terrell*, 17 Wash. 514 (50 Pac. Rep. 468), construing and applying Wash. Code Proc., § 1646.

Sec 326. Miscellaneous notes—Statutes construed. A lease invalid as to third parties because not recorded, is admissible in evidence to show the terms of the tenancy where there has been sufficient occupancy of the premises under it to create a tenancy by implication. *Emrich* v. *Union Stock-Yard Co.*, 86 Md. 482 (38 Atl. Rep. 943). Recitals in a deed as to the consideration given for it, are not admissible in evidence to show the value of the property as between persons not parties to it. *Lake Roland El. Ry. Co.* v. *Frick*, 86 Md. 259 (37 Atl. Rep. 650). The record of an inquest adjudging one insane, is not admissible to show his want of capacity in a previous transaction. *Rhodes* v. *Fuller*, 139 Mo. 179 (40 S. W. Rep. 760.) S. C. Rev. Stat. 1898, art. 2371, does not abrogate the common law rules as to the establishment of a lost deed and record thereof. A plat attached to a deed becomes a part of the deed and may be proved in the same man-

ner as the deed. *State* v. *Crocker*, 49 S. C. 242 (27 S. E. Rep.49). Mo.Rev. Stat. 1889, § 2428, applied,admissibility of record of a deed upon proof of loss of the original. *Hume* v. *Hopkins*, 140 Mo. 65 (41 S. W. Rep. 784). Neb. Code Civ. Proc., § 414, construed and applied—admissibility of copy of judicial records of a sister state—attestation. *Westerman* v. *Shepherd*, 52 Neb. 124 (71 N. W. Rep 950).

EXECUTION SALES.

McCOLGAN v. BALTIMORE BELT R. CO.

(85 Md. 519.)

Execution sale of portion of railroad right of way. Lands belonging to a railroad company which form an essential part of the right of way of an operating railroad can not be sold on execution to pay a judgment against the company.

FOWLER J.

Sec. 327. Statement of the case. The appellant, Charles C. McColgan, recovered a judgment against the Baltimore Belt Railroad Company in the superior court of Baltimore city for $3,543.75, which was affirmed by this court. (85 Atl. Rep. 59.) It is admitted that the judgment is valid and subsisting and that no part of it has been paid or otherwise discharged. The appellant procured an execution to issue from this court to the sheriff of Baltimore city to sell for the payment of said judgment the lands and tenements of the appellee company, consisting of twenty four lots of ground, with the improvements thereon, in the city of Baltimore, which, it is admitted, form part of the right of way of the appellee and upon which it has laid its tracks, and which, therefore, constitute an essential part of its railroad, and are necessary to its operation. The appellee's property is mortgaged for a loan of six million of dollars, and a sale of the lots levied on would prevent it from earning money to pay this and other debts. The circuit court of Baltimore city, upon a bill filed by the railroad company, passed a decree enjoining the

judgment creditor from selling the lots in question in satisfaction of his judgment—and hence this appeal.

Sec. 328. Execution sale of the property of a railroad which is essential to its operation. The contention of the appellant is that he may, without showing any special or general legislative authority other than the right which any judgment creditor has to sell the property of a debtor, levy upon and sell the corporate property of a railroad company, which is essential to the performance of its corporate duties. And although his proposition is in direct conflict with the views of this court as announced in *State* v. *Consolidation Company*, 46 Md. 1 and *Brady* v. *Johnson*, 75 Md. 449 (26 Atl. Rep. 49; 20 L. R. A. 737) and against the weight of authority, we are asked to adopt it and reverse the decree appealed from, which is based upon and in entire accord with the cases just cited. In *Brady* v. *Johnson*, 75 Md. 449 (26 Atl. Rep. 49; 20 L. R. A. 737), we held that it is clear upon well-settled principles that an excution will not lie against property such as the property here levied upon is admitted to be. And in the valuable notes to this case, as reported in 20 Lawy. Rep. Ann. 737, a number of authorities sustaining our view are collected. The learned authors of Elliott on Railroads, the most recent and one of the most valuable works on the subject, cite Brady's case, and a long list of authorities, including the supreme court of the United States and the highest courts of Indiana, Tennessee, Massachusetts, Ohio, Pennsylvania, California, Illinois and Nebraska in support of the proposition that "The franchise of a railroad company, and corporate property essential to the enjoyment of the franchise, are not subject to sale on execution, unless the legislature authorizes or assents to the transfer." 2 Elliott R. R., § 520. But, in addition to this, all of the corporate property being mortgaged, the injunction was properly issued upon the authority of the case of *Gue* v. *Tidewater Canal Co.*, 24 How. 257, cited in Brady's case, in which Taney, C. J., said, delivering the opinion of the court: "It would be against the principles of equity to allow a single creditor to destroy a fund to which other creditors had a right to look for payment, and equally against the principles of equity to permit him to destroy the value of the prop-

erty of the stockholders by dissevering from the franchise property which was essential to its useful existence." The rule we have adopted in Brady's case, and which, as we have seen, is almost universally recognized, does not rest upon any corporate immunity, nor was it adopted to afford any peculiar protection to corporations generally. This doctrine is applicable only to *quasi* public corporations, and since the state has charged them with a duty towards the public, it is against its policy to allow such corportions to be so crippled that the duty can not be preformed. In the case of *Plymouth Railroad Co.* v. *Colwell and Jacoby*, 39 Pa. St. 337 (80 Am. Dec. 526), Judge Woodward thus states the doctrine: "As to land which has been appropriated to corporate objects, and is necessary for the full enjoyment and exercise of any franchise of the company, whether acquirred by purchase or by exercise of the delegated power of eminent domain, the company hold it entirely exempt from levy and sale; and this on no ground of prerogative or corporate immunity, for the company can no more alien or transfer such land by their own act, than can a creditor by legal process; but the exemption rests on the public interests involved in the corporation. Though the corporation, in respect to its capital is private, yet it was created to accomplish objects in which the public have a direct interest, and its authority to hold lands was conferred that these objects might be worked out; they shall not be balked, therefore, by either the act of the company itself, or its creditors." The appellant fails to cite any authorities to sustain his position, and the only argument or suggestion he makes to support it is drawn from the alleged right under the general law of this state of every jugment creditor in every case to have his judgment satisfied by execution, and from the provisions of the 19th article of the Bill of Rights which guarantees to every man a remedy for any injury done to his person or property. But it is too late seriously to consider a proposition, the adoption of which involes a departure from the well-settled rules of law, a reversal of our own well-considered decisions, and the placing of ourselves in conflict with a long line of authorities, including the Supreme Court of the United States and the highest tribunals of many of the States of the Union. Decree affirmed.

Sec. 329. Execution sale of property of a corporation necessary to its performance of a public duty. In the case of *Overton Bridge Co.* v. *Taylor*, 33 Neb. 857 (51 N. W. Rep. 240; 29 Am. St. Rep. 514), in which it was held that a bridge erected by a bridge company and designed for the use of the public could not be sold on execution to pay a debt of the company, the supreme court of Nebraska say: "The property of strictly private corporations, —such, for instance, as manufacturing, mining and trading companies,— or perhaps those in which the public is indirectly interested,—as libraries, hospitals and the like,—is liable to be taken on execution, precisely as the property of an individual debtor; but the property of corporations which are classed as public agencies,—such as railroad and bridge companies,—which is essential to the exercise of their corporate franchise, and the discharge of the duties they have assumed towards the general public, cannot, without statutory authority, be sold to satisfy a common-law judgment, either on execution or in pursuance of an order or decree of court. *Gooch* v. *McGee*, 83 N. C. 59 (35 Am. Rep. 558); *Baxter* v. *Turnpike Co.*, 10 Lea 488; *Water Co.* v. *Hamilton*, 81 Ky. 517; *Palestine* v. *Barnes*, 50 Tex. 538; *Gue* v. *Canal Co.*, 24 How. 257; *Seymour* v. *Turnpike Co.*, 10 Ohio 476; *Foster* v. *Fowler*, 60 Pa. St. 27. It is said by Morawetz in his work on Private Corporations (§ 1125), 'If a corporation has received aid from the government for a public purpose, any property of the company, necessary to enable it to accomplish this purpose, is impressed with a trust in favor of the public, and cannot be seized and sold by the creditors of the company under execution. Property acquired by the company by purchase, if not necessary to enable it to perform its duties to the public, may be taken under an attachment or execution; but after exhausting this class of property, the only remedy of a judgment creditor is to obtain the appointment of a receiver, and a sequestration of the company's earnings.' The privileges conferred by law upon corporations to construct railroads, canals, bridges, etc., are conferred with a view to the use and accommodation of the public; and to permit the property necessary for the accommodation of the public to be taken and sold by creditors would be to defeat the prime object of the statute which endows such companies with corporate existence." Applying the principles enunciated in the case reported in full, it is held by the Michigan supreme court that the freight house and a portion of the right of way and tracks of a railroad, although at its terminus, cannot be sold for nonpayment of municipal assessments for local improvements, for which the company is liable. *Lake Shore & M. S. Ry. Co.* v. *City of Grand Rapids*, 102 Mich. 374 (60 N. W. Rep. 767; 29 L. R. A. 195). Citing, *Applegate* v. *Ernst*, 3 Bush 648 (96 Am. Dec. 272); *Georgia* v. *Atlantic & G. R. Co.*, 3 Woods 434 (Fed. Cas. No. 5,351); *Porter* v. *Railroad Co.*, 76 Ill. 561. And in West Virginia it is held that, it not appearing that all other remedies had been exhausted, one who had sold land to a railroad company as a part of its right of way could not have a forced sale of such portion of the right of way in order to satisfy a vendor's lien for unpaid purchase money, after the railroad had become

an operating line. *McKay* v. *Ripley & M. C. V. R. Co.*, 42 W. Va. 23 (24 S. E. Rep. 685). But in Ohio it is held that while one who has a lien on a specific part only of the property of a railroad corporation, is not entitled to a sale of such part,where the sale will have the effect to break the continuity of the road, and interfere with the public interests, he may by a proceeding in equity to which all parties in interest are made parties, enforce his lien by subjecting the whole of its property to sale, and obtaining a proper application of the proceeds. *Stewart* v. *Wheeling & L. E. Ry. Co.*, 53 O. St. 151 (41 N. E. Rep. 247; 29 L. R. A. 438). If a railroad corporation has ceased to discharge its duties and has for a long time not used its franchise and right of way for any purpose, and has abandoned all further work, the land occupied by it for a right of way and all the title of the corporation therein are subject to sale under execution. *Gardner* v. *Mobile & N. W. R. Co.*, 102 Ala. 635 (15 So. Rep. 271; 48 Am. St. Rep. 84). The court say, "Now, conceding that the property of the appellee essential to the exercise of its franchises and to effect the public purposes contemplated in its creation may be exempt from levy and sale under general process, can the exemption continue after the franchises have been abandoned? Can it exist when the necessity for its existence has terminated? We think it is coextensive with the performance of the public purposes the corporation was intended to promote, and, when these purposes are abandoned, the exemption ceases, and the property stands in the condition of property not necessary to enable the corporation to perform its duties to the public." Citing and approving *Benedict* v. *Heineburg*, 43 Vt. 231. Depot grounds are subject to execution sale under a constitutional provision that "real and personal property" of a railroad corporation, or "any part thereof, shall be liable to execution and sale in the same manner as the property of individuals." *Texas Mex. Ry. Co.* v. *Wright*, 88 Tex. 346 (31 S. W. Rep. 613; 31 L. R. A. 200).

EPITOME OF CASES.

Sec. 330. What real estate may be sold on execution. The estate of a devisee under a will providing that he takes nothing until his sister becomes of age, although a vested interest, cannot be sold on a creditor's bill until the happening of such contingency. *Mears* v. *Lamona*, 17 Wash. 148 (49 Pac. Rep. 251). Where a vendor retains the legal title to land sold to secure the payment of notes given for the purchase price, the title remaining in him, is subject to levy and sale under an execution against him, but after he has sold the notes to another he has no such interest in the property as is subject to execution. *Leitch* v. *May*, 98 Ga. 714 (27 S. E. Rep. 151). Under Ga. Code, §§ 1969, 1970, one to whom

land has been conveyed as a security for a debt, cannot cause the land to be levied upon and sold under a judgment for the debt without having previously had recorded a reconveyance of the land to the debtor; and where the land lies in more than one county, the deed must be recorded in each of the counties. *Cade* v. *Larned*, 99 Ga: 588 (27 S. E. Rep. 166). A mandamus will not be issued to compel a sheriff to sell on execution land claimed as a homestead, where it appears that the lien of the judgment on which the execution is issued has been divested by a previous sale. *Mathews* v. *Nance*, 49 S. C. 389 (27 S. E. Rep. 408). In Maine, the real estate of certain corporations may be sold on execution without first exhausting the remedy against personal property. Laws 1899, p. 119.

Sec. 331. Exemption of property from execution sale. No exemption is allowed, as against a judgment for damages rendered in favor of a landlord in an action by him, under Ind. Rev. Stat. 1894, § 7106, to recover possession and damages from his tenant unlawfully holding over; and the rental value of the premises from that time is recoverable as damages. *Thomas* v. *Walmer*, 18 Ind. App. 112 (46 N. E. Rep. 695). Where land is exempt from execution sale, the judgment debtor may convey it without regard to any judgment against him and the purchaser may maintain an action to quiet his title against any lien asserted by virtue of a judgment rendered against his grantor, *Citizens' State Bank* v. *Harris*, 149 Ind. 208 (48 N. E. Rep. 856); but where an execution creditor's right to have certain property exempt from sale is dependent upon asserting a claim of exemption before sale is made, one who acquires his title before the execution sale of the property must duly assert the claim of exemption if he desires the benefit of it. Ind. Rev. Stat. 1894, §§ 715, 725, construed and applied. *Moss* v. *Jenkins*, 146 Ind. 589 (45 N. E. Rep. 789). Cal. Code Civ. Proc., § 690—property exempt from execution—amended, Laws 1899, p. 19. Utah Rev. Stat., § 3245 — property exempt from execution — amended, Laws 1899, p. 99.

Sec. 332. Exemption of property from execution sale—Public property. The fact that Mont. Comp. Stat.

1887, div. 1, § 321, subd. 9, after exempting public property from execution provides that "but no article or species of property mentioned in this section shall be exempt from execution issued upon a judgment recovered for its price or upon a mortgage thereon," does not render a public school house liable to a sale on execution to satisfy the claims of a subcontractor for work done or materials furnished in its erection, and for which he can not enforce a mechanic's lien. *Whitesides* v. *School Dist. No. 6*, 20 Mont. 44 (49 Pac. Rep. 445). The court say: "But we think that the language quoted is entirely inapplicable to the case of a subcontractor who is seeking to foreclose a mechanic's lien. Not having the right to subject the property to the lien, it should not be subjected to a sale to enforce such lien. *State* v. *Tiedemann*, 69 Mo. 306 (33 Am. Rep. 499). Whatever may be the rights of a direct judgment creditor of the school district, who has sold property to the trustees for public uses, it is certain that the statute does not mean to limit the previous general words of exemption by permitting a school house to be sold under an execution in favor of a subcontractor who has no special lien, for a small part of its value, and perhaps to be forever lost to the school district before funds could be collected by a tax levy wherewith to pay the amount of the debt."

Sec. 333. Issue and return of execution—Description of property. In North Carolina, notwithstanding the lien of a judgment has ceased, a motion to issue execution thereon is not barred if execution has been regularly issued once in every period of three years. *McCaskill* v. *McKinnon*, 121 N. C. 192 (28 S. E. Rep. 265; 61 Am. St. Rep. 659). McClain's Ia. Code, § 4221, construed and applied—issuance of execution against deceased judgment debtor. *Hansen's Empire Fur Factory* v. *Teabout*, 104 Ia. 360 (73 N. W. Rep. 875). While an officer is yet in office he may amend his return of an execution so as to make it conform to the real truth of the transaction at the time the original return was made. *McLeod* v. *Brooks Lum. Co.*, 98 Ga. 253 (26 S. E. Rep. 745). The return of an execution long after the day fixed for its return, endorsed, "further proceedings stayed by order of plaintiff," operates to relinquish all rights acquired by its

previous levy. *Ashland Bldg. & Sav. Ass'n* v. *Jones*, Ky. (41 S. W. Rep. 487). Hill's Wash. Code, § 8124, construed and applied—notice by laborers having claims against execution debtor—priority of claim. *Gleason* v. *Tacoma Hotel Co.*, 16 Wash. 412 (47 Pac. Rep. 894).

Construing and applying Ga. Code, § 3640, providing that the levy "shall plainly describe the properiy levied on and the amount and the interest of the defendant therein," it is held that a levy on the land is void for uncertainty which fails to describe the land levied upon with such precision as to inform the purchaser what he is buying and to enable the officer selling tc place the purchaser in possession. *Bird* v. *Burgsteiner*, 100 Ga. 486 (28 S. E. Rep. 219). The description need not be technically accurate, it being sufficient if the property can be located by it. *Textor* v. *Shipley*, 86 Md. 424 (38 Atl. Rep. 932). The failure of the sheriff to properly describe the land in his return cannot be construed to retroact upon the sale so as to affect the rights of the purchaser. *Guelot* v. *Pearce*, Ky. (38 S. W. Rep. 892).

Sec. 834. Levy of execution—What constitutes a levy. As against subsequent purchasers and creditors, it is not essential to the validity of a levy of an execution on land that the debtor be without chattel property on which to levy; nor will the levy be rendered invalid, or ineffectual to create a lien, by the omission of the officer to endorse on the writ, no goods. Ohio Rev. Stat., § 5888, construed and applied. *Wheeling, L. E. & P. Coal Co.* v. *First Nat. Bank*, 55 O. St. 283 (45 N. E. Rep. 680). An endorsement upon the return of a tax execution reciting "levy made" is sufficient to show that there was a seizure by entry. *Textor* v. *Shipley*, 86 Md. 424 (38 Atl. Rep. 932). Particular entry upon the return of an attachment held insufficient to show a valid levy. *New England Mortg. & Sec. Co.* v. *Watson*, 99 Ga. 773 (27 S. E. Rep. 160). Ga. Code, § 3644, construed and applied—levy on land in two counties. *Cade* v. *Larned*, 99 Ga. 588 (27 S. E. Rep. 166).

It is held that in order for an officer to make a proper levy of an execution on lands already subject to the lien of a judgment on which the writ is issued, under Cal. Code Civ.

Proc., § 691, it is not necessary for him to file a copy of the writ and description of the property or a notice of the levy with the recorder of the county as in cases of attachment. *Lehnhardt* v. *Jennings*, 119 Cal. 192 (51 Pac. Rep. 195). The court say: "The term 'levy,' when employed to connote the acts by which an officer manifests the intent to appropriate land to the satisfaction of an execution, and when not defined by statute, has considerable elasticity of meaning; so, probably for the reason that the common law permitted no levy of the writ on lands, it never ascertained the procedure for such a purpose. In one state a statute provided that a 'levy' should be understood to be the actual seizure of property by the officer executing the writ. It was held that this applied only to property capable of being seized, that it was not necessary to enter on land to make a levy, and that the law was silent as to what should be evidence of a levy on this species of property. *Duncan* v. *Matney*, 29 Mo. 368 (77 Am. Dec. 575). In Louisiana only, it appears, is the levy on land assimilated to that of goods, and the officer is required to take and hold actual possession. *Pipkin* v. *Sheriff*, 36 La. Ann. 782. Quite in contrast with which practice is the doctrine in North Carolina, that the levy 'may be made in the office, although it (the land) may be ten miles distant, and the officer has never seen it.' *Bland* v. *Whitfield*, 46 N. C. 125. See, also, 2 Freem, Ex'ns, § 280a; 8 Enc. Pl. & Prac., p. 511, *et seq.* In *Wood* v. *Colvin*, 5 Hill 228, it was held that, when the judgment on which execution has issued is a lien upon land, it is unnecessary to make a formal levy of the writ before proceeding to sell, and this has been said here to be the correct rule. *Bagley* v. *Ward*, 37 Cal. 132 (99 Am. Dec. 256). * * * It was remarked in *Southern Cal. Lumber Co.* v. *Ocean Beach Hotel Co.*, 94 Cal. 228 (29 Pac. Rep. 627; 28 Am. St. Rep. 115), that the act of the officer by which he indicates the particular property which he intends to sell under the execution is called a 'levy.' The conclusion stated more at large by Shaw, C. J., in *Hall* v. *Crocker*, 8 Metc. (Mass.) 245, is similar: 'The statute having fixed upon no specific act which will constitute the seizure of land on execution, the court are of the opinion that when an execution has been delivered to an officer, with directions to levy the same on the real estate of the

debtor, and the officer accepts the execution with such directions, and consents and undertakes to execute it, any act done by him in pursuance of that purpose is a beginning to execute it, and constitutes a seizure; and the making of a memorandum which enables him to fix the date of such act, and make his return, is sufficient for that purpose.' With us, the officer is required to give notice of the sale of real property under execution by posting notices thereof in the township or city where the property is situated, and by publication in a newspaper. Code Civ. Proc., § 692. Notice thus given is certainly an unequivocal act manifesting the intent of the officer to appropriate the described property to sale for the satisfaction of the writ, and, in our opinion, is a sufficient levy in any case where the judgment is a lien on the property to be sold. In a case in the New York court of appeals a question arose upon the effect of a statute relating to the execution of process 'by a seizure of or levy on money or other property in pursuance thereof.' A sheriff, holding such process, advertised for sale certain real property thereunder; and this was held to constitute a sufficient 'seizure,' within the meaning of the statute. *Institution* v. *Anderson*, 88 N. Y. 174. We are safe in saying that, if it was a sufficient seizure, it was also a sufficient levy."

Sec. 835. Appraisement — Notice of sale. In Nebraska, an officer, levying an execution upon real estate, must cause an appraisement of the property to be made and a copy of such appraisement to be deposited in the office of the clerk of the district court from which the execution issued before the sale is advertised. *First Nat. Bank* v. *Hamer*, 51 Neb. 23 (70 N. W. Rep. 497). Particular appraisement held valid. *Guelot* v. *Pearce*, Ky. (38 S. W. Rep. 892). Neb. Code Civ. Proc., § 491d, construed and applied—duty of officer to deposit copy of appraisement in the office of the clerk of the court. *Reuland* v. *Waugh*, 52 Neb. 358 (72 N. W. Rep. 481). Ga. Laws 1890–91, Vol. 1, p. 241, construed and applied — sufficiency of notice by advertisement. *Bird* v. *Burgsteiner*, 100 Ga. 486 (28 S. E. Rep. 219). Mo. Rev. Stat., § 4941 — notice of sale and place of making sale — amended, Laws 1899, p. 208.

Sec. 336. Certificate of purchase—Sheriff's deed—Confirmation. A sheriff's certificate of purchase does not operate to pass any title to the purchaser in the absence of the execution of a deed by him after the expiration of the period allowed for redemption. *Hill* v. *Swihart*, 148 Ind. 319 (47 N. E. Rep. 705). In Tennessee the execution of a sheriff's deed is necessary in order to vest the legal title in the purchaser. *Gross* v. *Washington*, Tenn. (38 S. W. Rep. 442). As to the jurisdiction of the court of ordinary in Georgia, to compel a sheriff to execute a deed for land sold under execution by him, see *Burekhalter* v. *O' Connor*, 100 Ga. 366 (28 S. E. Rep. 154). N. Dak. Comp. Laws, § 5149 construed and applied—nature of proceedings upon application to confirm an execution sale. *Warren* v. *Stinson*, 6 N. Dak. 293 (70 N. W. Rep. 279). Where a sale is otherwise regular, the fact that it has not been confirmed by the court according to the statute, will not defeat the purchaser's title, upon a collateral attack by one who does not claim either through or under the judgment debtor. S. Dak. Comp. Laws, §§ 5415, 5160, construed and applied. *Baxter* v. *O'Leary*, 10 S. Dak. 150 (72 N. W. Rep. 91; 66 Am. St. Rep. 702). In Maine, it is provided by statute that the cost of Internal Revenue stamps affixed to a sheriff's deed shall be taxed as a part of the costs of the sale. Laws 1899, ch. 97. A recent statute of Kansas makes a sheriff's deed "sufficient evidence of the legality of the sale and of the proceedings therein until the contrary be proved," and provides that it shall vest in the purchaser the title of the execution defendant. Laws 1899, p. 190. In Virginia, a sheriff's deed from which it appears that the sale was regularly made is made *prima facie* evidence of that fact and the truth of its other recitals. Laws 1897–98, p. 322.

Sec. 337. Title, rights and liabilities of purchaser. A purchaser at an execution sale takes subject to the rights of the parties as they shall be adjudicated in the action then pending and by virtue of which the property is sold, *Manning* v. *Ferguson*, 103 Ia. 561 (72 N. W. Rep. 762); but he does not succeed to an after-acquired title in the execution debtor. *Rupert* v. *Jones*, 119 Cal. 111 (51 Pac. Rep. 26). A pur-

chaser at an execution sale takes subject to pre-existing equities in favor of third persons against the execution debtor. *Clemons* v. *Cox*, 114 Ala. 350 (21 So. Rep. 426). A purchaser takes subject to the title of a prior purchaser from the execution debtor who was in possession of the property at the time of the execution sale under a deed void as a conveyance, but valid as a contract to convey, and who has paid the purchase price. *Murphy* v. *Green*, Ala. (22 So. Rep. 112). The title of a purchaser at an execution sale, had under a judgment in attachment, relates back to the levy of the judgment and has priority over intervening incumbrances. *Reilley* v. *Wright*, 117 Cal. 77 (48 Pac. Rep. 970). The title and possession of one holding under a void execution sale, cannot be disturbed by one who cannot show legal title. *King* v. *Coleman*, 98 Tenn. 561 (40 S. W. Rep. 1082). In Georgia a purchaser acquires an unincumbered title to the land, a secured creditor being transferred to the proceeds of sale. *Marshall* v. *Hodgkins*, 99 Ga. 592 (27 S. E. Rep. 748). Wash. Code Proc., § 519, giving a purchaser the right to possession or the value of the use and occupation from the date of the sale, does not give him the right to rents assigned by the judgment debtor before the judgment was rendered. *Griffith* v. *Burlingame*, 18 Wash. 429 (51 Pac. Rep. 1059). Ky. Stat. 1894, § 1689, Civ. Code, § 449, applied—motion by purchaser for writ of possession—trial by chancellor. *Scott* v. *Mitchell*, Ky. (39 S. W. Rep. 507).

In Alabama it is held that a purchaser at an execution sale is not liable to the redemptioner for waste. *O' Connor* v. *Bank of Attalla*, 116 Ala. 585 (22 So. Rep. 902). Upon the setting aside of a sheriff's sale on account of mutual mistake, the purchaser is entitled to credit for taxes paid on the property and expenditures made in necessary repairs, as against the rents received by him. *Howlett* v. *Central Car L. & Imp. Co.*, 50 S. C. 1 (27 S. E. Rep. 533). An execution creditor is not entitled to the summary remedy for recovering judgment against a purchaser at execution sale for the amount for which real estate is sold, provided by Ind. Rev. Stat. 1894, § 772, where such purchaser made full payment of the amount of his bid to the sheriff at the time he received his

deed, by means of a check which was received under a certain condition known to such execution creditor who subsequently accepted it, because payment of the check was refused on order of the drawer, where the judgment creditor makes no offer to rescind the contract or tender back the check. *Sutton* v. *Baldwin*, 146 Ind. 361 (45 N. E. Rep. 518).

Sec. 338. Validity of sales—Setting aside. A sale of land on execution under a judgment rendered against a defendant, over whom the court failed to obtain jurisdiction, is void. *Bernhardt* v. *Brown*, 119 N. C. 506 (26 S. E. Rep. 162; 36 L. R. A. 402). Where, on account of a mutual mistake in a vendee's deed, the wrong land is described, an execution sale of such land against him is void, and a purchaser thereat acquires no right to have the mistake corrected so as to give him title to the land actually purchased by the vendee. *Burrows* v. *Parker*, 31 Or. 57 (48 Pac. Rep. 1100; 65 Am. St. Rep. 812). Where it appears that the purchaser at an execution sale and another person combined to prevent bidding and entered into an agreement that the purchaser should buy the property as low as possible and sell it to the other at an agreed advance, which agreement was carried out, the sale may be set aside. *Lennon* v. *Heindel*, 56 N. J. Eq. 8 (37 Atl. Rep. 147). While, as a general rule, the proper remedy to set aside an execution sale is by motion, yet under exceptional facts a bill in equity may be filed to accomplish this object. *Warren* v. *Stinson*, 6 N. Dak. 293 (70 N. W. Rep. 279). One in possession of real estate under a claim of ownership, may enjoin an execution sale of it as the property of another who is shown to have no interest in it, upon making a showing of presumptive title. *Moore* v. *Kleppish*, 104 Ia. 319 (73 N. W. Rep. 830). Where the execution plaintiff, after a sale had been advertised, gave explicit orders to the sheriff not to sell, and paid the costs and expenses up to that date, the delivery of a deed in pursuance of a subsequent sale, which the sheriff was compelled to make by strangers to the record and of which the plaintiff had no notice, may be enjoined by him. *Vineland Nat. Bank* v. *Shinn*, 55 N. J. Eq. 415 (36 Atl. Rep. 953). An execution sale of land to satisfy a judgment assessing benefits against it in a condemnation pro-

ceeding, cannot be attacked collaterally on account of mere errors or irregularities in the judgment not going to the jurisdiction. *Lovitt* v. *Russell*, 188 Mo. 474 (40 S. W. Rep. 128). In order for an execution sale to be set aside on account of the property being exempt from sale as a homestead, the application must show that the homestead character of the property existed at the time of the sale. *Zander* v. *Scott*, 165 Ill. 51 (46 N. E. Rep. 2). Particular facts held sufficient to show cause for setting aside an execution sale. *Cornoy* v. *Wetmore*, 101 Ia. 202 (70 N. W. Rep. 178). Particular facts held insufficient to show ground for enjoining an execution sale. *Jones* v. *McCrady*, 48 S. C. 533 (26 S. E. Rep. 802). Ind. Rev. Stat. 1894, § 294, which prohibits an action for the recovery of real property sold on execution, by the execution debtor or any person claiming under him after ten years, is held to apply to sales irregular or absolutely void from defective descriptions or other causes, and to protect the purchaser and those claiming under him in a perfect title. *Marley* v. *State*, 147 Ind. 145 (46 N. E. Rep. 466).

Sec. 339. Miscellaneous notes. Payment of the purchaser's bid may be made by check where the officer making the sale and the parties interested consent thereto. *Sutton* v. *Baldwin*, 146 Ind. 361 (45 N. E. Rep. 518). In South Carolina it is held that an execution sale under a junior judgment divests the lien of senior judgments whether executions have been issued upon them or not, and it is the duty of the sheriff to apply the proceeds of such sale to the various judgments having a lien according to their rank. *Matthews* v. *Nance*, 49 S. C. 389 (27 S. E. Rep. 408). See Ballards' Law of Real Prop., Vol. V, § 321. In Louisiana it is held that a sheriff holding a plantation under seizure by attachment, cannot, without the consent of the plaintiff, proceed to its cultivation at the expense and risk of the latter, and if the planting venture prove a failure and loss ensue, recover the amount of the loss from the plaintiff as costs of suit to be taxed. *Amrican Nat. Bank* v. *Childs*, 49 La. 1359 (22 So. Rep. 884). Washington has a new statute covering the entire subject of "sales of property under execution." Laws 1899, p. 85.

EXECUTORS AND ADMINISTRATORS.

EPITOME OF CASES.

Sec. 340. Contracts and conveyances by executors and administrators. An executor may make a valid agreement with one to whom the estate is indebted to the effect that if he purchases at the sale of the real estate to pay debts, the amounts due him may be deducted from the purchase price. *In re Smith's Estate*, 179 Pa. St. 208 (36 Atl. Rep. 223). Where a conveyance made in good faith by an executor to discharge a debt is set aside, the amount of the debt is properly fixed as a charge on such land. *Sneed* v. *Russell*, Tenn. (42 S. W. Rep. 213). An executor to whom land is devised in trust for seven years for the use of the testator's children, unless the majority of them elect to sell the same sooner, cannot effect a sale by an application to a court, requested by a majority of the children, but they alone can exercise control over the transfer of title. *Porterfield* v. *Porterfield*, 85 Md. 668 (37 Atl. Rep. 358). Where a conveyance made by one who is an administrator of two persons, shows by its recitals that he is conveying lands belonging to both of them, under authority of the proper court and the acknowledgment is made in his name as administrator for each of the persons, such deed is not invalid because it is simply signed with his name as administrator without further designation following his signature. *Connaughton* v. *Bernard*, 84 Md. 577 (36 Atl. Rep. 265).

Sec. 341. Sale and conveyance under a power of sale in a will. An executor will be required to exercise a discretionary power of sale in good faith for the benefit of the estate and not for his personal profit. *Sneer* v. *Stutz*, 102 Ia. 462 (71 N. W. Rep. 415). A power of sale may be implied when necessary to carry out other express provisions of the will. *Corse* v. *Chapman*, 153 N. Y. 466 (47 N. E. Rep. 812).

One who purchases land from an executor having a discretionary power to sell, takes subject to the lien of the debts of the testator. *Seeds* v. *Burk*, 181 Pa. St. 281 (37 Atl. Rep. 511). Where the exercise of the power of sale is left subject to the judgment of the executrix named in the will, it cannot be exercised by an administrator appointed, with the will annexed, upon her resignation. *Bigelow* v. *Cady*, 171 Ill. 229 (48 N. E. Rep. 974; 63 Am. St. Rep. 230). A conveyance by a surviving executor of a will conferring power to sell who has no other connection with the estate, will be presumed to be in execution of the power though it is not mentioned in the deed. *Dick* v. *Harby*, 48 S. C. 516 (26 S. E. Rep. 900). Where the power to sell his real estate is conferred by a testator on such of his executors "as shall qualify and survive," all of such executors who qualify and survive must join in a deed in order to pass title, and the power to do so cannot be delegated from one to the other. *Tarlton* v. *Gilsey*, N. J. Eq. (37 Atl. Rep. 467). Under Cal. Code Civ. Proc., § 1561, a sale of real estate by an executor under a power contained in a will, passes no title unless confirmed by the court, except where the will vests the legal title in the executors as trustees. Civ. Code, §§ 847, 857, subds. 1, 2, applied to particular facts which were held not to create such a trust. *Bennalack* v. *Richards*, 116 Cal. 405 (48 Pac. Rep. 622).

Sec. 342. Rights as to possession and rents of decedent's realty. Ga. Code, § 2485, construed and applied —right of administrator to sue for possession of real estate. *Mayor of Chauncey* v. *Brown*, 99 Ga. 766 (26 S. E. Rep. 768). In Virginia it is held that the rents of a decedent's real estate accruing after his death belong to his heirs. *Lightner's Ex'x* v. *Speck*, Va. (28 S. E. Rep. 826). In Florida, prior to the adoption of the Rev. Stat. 1892, an administrator could maintain ejectment for lands not exempt belonging to his intestate at the time of his death. But by § 1917 of these Revised Statutes real estate of a decedent descends to the heir or devisee, and remains in his possession until the administrator or executor takes possession of or sells same under an order of court for the payment of debts, or until the land is sold under execution by a creditor of the

decedent. *Rose* v. *Withers*, 39 Fla. 460 (22 So. Rep. 724). Sureties on an administrator's bond are not liable for his misappropriation of rents collected by him which belong to the widow and heirs of his decedent. *Denton* v. *Crouch*, Ky. (41 S. W. Rep. 277). Nor for the proceeds of the sale of land in a foreign state under a power conferred by the will, where such will had never been probated in such state. *Emmons* v. *Gordon*, 140 Mo. 490 (41 S. W. Rep. 998; 62 Am. St. Rep. 784).

Sec. 343. Suits by executors and administrators. An executor who has no title or interest in his decedent's real estate, cannot maintain an action to reform his title deed. *Thiefes* v. *Mason*, 55 N. J. Eq. 456 (36 Atl. Rep. 946). Executors may sue for injuries done to their decedent's realty in his life time. *Lake Roland El. Ry. Co.* v. *Frick*, 86 Md. 259 (37 Atl. Rep. 650). An action, under Ala. Code 1886, § 3296, for the wrongful cutting of trees from the land of a decedent after the appointment of an administrator, cannot be maintained by him, but the right of action is in the heirs. *Louisville & N. R. Co.* v. *Hill*, 115 Ala. 334 (22 So. Rep. 163). Under the statutes of Missouri, an administrator cannot sue to set aside a foreclosure sale of his decedent's real estate on account of fraud. *Thorp* v. *Miller*, 137 Mo. 231 (38 S. W. Rep. 929).

Sec. 344. Sale to pay debts. A decedent's equitable title to real estate may be sold to pay his debts. *Howell* v. *Jump*, 140 Mo. 441 (41 S. W. Rep. 976). If a deficiency in the personal assets of an estate has been caused by maladministration or devastavit, a sale should not be ordered. *Spear* v. *Banks*, 114 Ala. 323 (21 So. Rep. 334). But a depreciation in value of personal assets, which were originally sufficient to pay the indebtedness of an estate, occurring during the delay of an adminstrator in their application to the payment of debts exercised by him in good faith, does not deprive him of the right to resort to a sale of real estate. *Pearson* v. *Gillenwaters*, 99 Tenn, 446 (42 S. W. Rep. 9; 63 Am. St. Rep. 844); 99 Tenn. 462 (42 S. W. Rep. 199). An executor, who by his delay has lost his right to enforce a

lien against his decedent's real estate for a balance due him, cannot have the land sold to pay the same. *Battersby* v. *Castor*, 181 Pa. St. 555 (37 Atl. Rep. 572). Where a decedent leaves a surviving widow, an unconditional sale of his real estate to pay debts should not be ordered until her dower has been assigned, unless she has elected to take the value of her dower in money. *McKittrick* v. *McKittrick*, 43 W. Va. 117 (27 S. E. Rep. 303). When a deficiency of personal assets exists it is not necessary to wait until they are actually applied before land can be sold. *Pearson* v. *Gillenwaters*, 99 Tenn. 446 (42 S. W. Rep. 9; 63 Am. St. Rep. 844); 99 Tenn. 462 (42 S. W. Rep. 199).

Sec. 345. Sale to pay debts—Petition and parties. A statement in the petition that the condition of the property was "fair," where a statement of the condition of the property is required, is sufficient to sustain an order of sale upon a collateral attack. *In re Devincenzi's Estate*, 119 Cal. 498 (51 Pac. Rep. 845). A judgment creditor exercising his right under Wash. Code Proc., § 1014, to apply for an order of sale to pay debts, is required to make the same allegations in his petition as an executor or administrator would be required to under § 1005. *Prefontain* v. *McMicken*, 16 Wash. 16 (47 Pac. Rep. 231). For particular case as to sufficiency of description of land sought to be sold, see *Macmanus* v. *Orkney*, 91 Tex. 27 (40 S. W. Rep. 715). Creditors of a decedent are not necessary parties. *Rawls* v. *Carter*, 119 N. C. 596 (26 S. E. Rep. 154). A purchaser of land from the widow and heirs of an intestate is a proper party defendant. Ala. Code, § 2106, construed and applied. *Spear* v. *Banks*, 114 Ala. 323 (21 So. Rep. 334).

Sec. 346. Sale to pay debts—Laches and statute of limitations. The right of creditors or of an administrator to subject the lands of the decedent to the payment of his debts, may be lost by laches; but where an heir of the decedent is administrator, he cannot take advantage of his own laches in order to protect his interest in the land from the payment of the debts of the estate. *Brogan* v. *Brogan*, 63 Ark. 405 (39 S. W. Rep. 58; 58 Am. St. Rep. 124). Under

Ind. Rev. Stat. 1894, § 2487, proceedings by an administrator to sell lands fraudulently conveyed by his decedent must be brought within five years after the decedent's death. *Galentine* v. *Brubaker*, 147 Ind. 458 (46 N. E. Rep. 903).

Sec. 847. Sale to pay debts—Practice. A court need not hear proof of the allegations of the petition where their truth appears from the papers on file in the case and they are not denied by any one. *In re Brannan's Estate* Cal. (51 Pac. Rep. 320). In a proceeding by the administrator to sell real estate to make assets, defendants to the action may show any facts which tend to establish that it is not necessary to resort to the real estate of the decedent in order to have sufficient funds to pay his debts. *Person* v. *Montgomery*, 120 N. C. 111 (26 S. E. Rep. 645). A decedent's heirs at law may resist a petition to sell his land for the payment of his debts, by insisting upon a proper application of personal property to that purpose, which the administrator wrongfully refuses to inventory. *Duffield* v. *Walden*, 102 Ia. 676 (72 N. W. Rep. 278). Where a probate court orders the sale of a decedent's homestead to pay debts, the remedy is by appeal and not by a direct proceedings attacking the judgment. *Sigmond* v. *Bebber*, 104 Ia. 481 (73 N. W. Rep. 1027). Proceedings by a judgment creditor of a decedent to enforce payment of his judgment must be perfected while the lien exists. *Hansen's Empire Fur Factory* v. *Teabout*, 104 Ia. 360 (73 N. W. Rep. 875). An administratrix, who seeks to have the lands of her deceased husband sold to pay a claim alleged to be due to her on account of a loan to her husband, has the burden of proof. In *re Martin's Estate*, 181 Pa. St. 378 (37 Atl. Rep. 561). Cal. Code Civ. Proc. § 1552, applied—objection which should be considered upon confirmation. *In re Brannan's Estate*, Cal. (51 Pac. Rep. 320). Minn Gen. Stat. 1894, § 4598, construed and applied—expiration of license to sell—power of probate court to issue a new license. *Harrison* v. *Harrison*, 67 Minn. 520 (70 N. W. Rep. 802).

Sec. 848. Title and rights of purchaser at an administrator's sale. An administrator's sale of lands to pay debts is a judicial sale, and the doctrine of caveat emptor applies to

a purchaser thereat. *Motley* v. *Motley*, 58 Neb. 875 (78 N. W. Rep. 788). Where the proceedings disclose that the decedent left a widow, a purchaser at a sale to pay debts, takes subject to her dower rights, under Neb.Comp. Stat., ch. 23, although she was a party to the proceedings and attended the sale without making any assertion of such right. *Motley* v. *Motley*, 58 Neb. 875 (78 N. W. Rep. 788). Where, at a void administrator's sale, of the mansion house and messuages of her deceased husband, a widow purchases the land and her money is used to extinguish demands against his estate, she is entitled to the payment of the amount paid as a condition precedent to an action by the heirs to assign her dower in such land, but the rights of her vendees in reference to improvements, should be left for adjustment between them and the heirs after the dower is fixed. *Carey* v. *West*, 139 Mo. 146 (40 S. W. Rep. 661).

Sec. 849. Validity of sales—Setting aside. The fact that land sold at an administrator's sale for only enough to pay the costs of the administration, does not defeat the sale. *Howell* v. *Jump*, 140 Mo. 441 (41 S. W. Rep. 976). A sale by the administrator of a deceased vendee to pay the purchase price, will be held void as against his heirs, where it appears that the vendor, administrator and the widow of the vendee all collusively combined to enable the widow to bid in the land at less than its salable value. *McQueen* v. *McDaniel*, Ky. (38 S. W. Rep. 880). Where there is no attempt to follow the provisions of the statute (Cal. Code Civ. Proc, § 1536, *et seq.*), regulating the sale of a decedent's real estate, the sale is void. The statute applies to a sale to pay expenses charged against an estate of less than $1,500 in value, which is to be distributed under § 1469. *Wills* v. *Pauly*, 116 Cal. 575 (48 Pac. Rep. 709). An administrator's sale, otherwise regular, will not be set aside as against one who purchased thereat in good faith and for full value, because the notices of the sale were not posted in the places required by law, but were posted in places more likely to secure a good sale. How. Ann. Mich. Stat., § 6040, construed and applied. *Averill* v. *Jackson City Bank*, 114 Mich. 20 (72 N. W. Rep. 15). An administrator's sale will not be held invalid where

the property was advertised for sale subject to a specified annual ground rent because the rent is under a sublease and the property is a part only of the original demised premises rented in gross, it appearing that the rental stipulated under the sublease has been accepted for more than twenty years by the owner of the original reversion. *Connaughton* v. *Bernard*, 84 Md. 577 (36 Atl. Rep. 265). Particular fact case in which it is held that an administrator's sale will not be set aside on account of the property being subject to a slight easement. *Connaughton* v. *Bernard*, 84 Md. 577 (36 Atl. Rep. 265). Minn. Gen. Stat. 1894, § 4612, construed and applied—particular administrator's sale held void. *Buntin* v. *Root*, 66 Minn. 454 (69 N. W. Rep. 330). Particular defects held sufficient to invalidate a sale *Cates* v. *Cates*, Ky. (41 S. W. Rep. 276).

Sec. 350. Collateral attack upon sales. A judgment ordering a sale of land for assets can be set aside only in a direct proceeding for that purpose. *Rawls* v. *Carter*, 119 N. C. 596 (26 S. E. Rep. 154). Where a petition is sufficient to confer jurisdiction, an order of sale made thereunder is not subject to a collateral attack. *In re Devincenzi's Estate*, 119 Cal. 498 (51 Pac. Rep. 845). Where the validity of an order for the sale of lands made by a court of general jurisdiction is challenged in a collateral proceeding, that court will be presumed to have had before it and to have passed upon all those matters, the existence of which was necessary in order to authorize the making of such order. *Clark* v. *Costello*, 59 N J. L. 234 (36 Atl. Rep. 271).

Sec. 351. Purchase by executor or administrator at his own sale. The purchase of land by an executor, directly or indirectly, at his own sale is fraudulent; and the sale will be set aside whether the property has brought a fair price or not and without any allegation of actual fraud unless it has been ratified by the parties interested in the lands. *Shute* v. *Austin*, 120 N. C. 440 (27 S. E. Rep. 90). But an administrator purchasing at his own sale when legally conducted, acquires the legal title subject to the equitable right of interested parties to set aside the sale for sufficient cause. Heirs of

a decedent cannot set aside such a sale where the price was adequate and the proceeds were absorbed by creditors who were satisfied with the sale. *Highsmith* v. *Whitehurst*, 120 N. C. 128 (26 S. E. Rep. 917). In Alabama it is held that "where, under an order of sale of lands of his intestate, granted by the probate court upon his petition, the admistrator becomes the purchaser, the heirs are entitled to notice of the proceedings after the sale; and, if this notice is not shown to have been given, a deed executed under the proceedings will be held void on collateral attack." *Allison* v. *Allison*, 114 Ala. 398 (21 So. Rep. 1008). Applying La. Rev. Civ. Code, art. 1146, 1790, it is held that a purchase by a tutor administering a succession, at his own sale, is absolutely null and void. *Aronstein* v. *Irvine*, 49 La. 1478 (22 So. Rep. 405). Particular evidence held to show that a purchase made by a third party was for the administrator. *McNeill* v. *Fuller*, 121 N. C. 209 (28 S. E. Rep. 299).

Sec. 352. Statutes amended and new statutes. Ida.Rev. Stat., §§ 5499–5503—disposition of mining interests of decedents—amended, Laws 1899, p. 377. Minn.Laws 1899, p.66—irregularities in sales by probate courts validated. Minn. Laws 1899, p. 226—act to enable executors, administrators or guardians to convey to school districts lands to be used as a school house site. N. J. Laws 1899, p. 230—act empowering guardians,executors or trustees to mortgage real estate. N. Dak. Laws 1899, p. 151—act to provide for mortgaging the real estate of deceased persons. Ohio Rev. Stat., § 6145—power of court to determine equities and priority of liens and provide for distribution of proceeds of sale—amended, Laws 1898, p. 287. Utah Rev. Stat., § 3889—petition to sell decedent's lands —notice and order of hearing—amended, Laws 1899, p. 23. Wis. Rev. Stat., § 3919, amended by adding § 3919a—when irregularities in proceedings are not to bar a sale. Laws 1899, p. 275.

FENCES.

EPITOME OF CASES.

Sec. 353. Partition fences. Cal. Stat. 1885, p. 45, "regulating the height of division fences and partition walls in cities and towns," does not apply to a structure standing wholly on the lot of the owner thereof. *Ingwersen* v. *Barry*, 118 Cal. 342 (50 Pac. Rep. 536). A decision of fence viewers under 8 How. Ann. Mich. Stat. § 799, as to the cost of building or repairing a division fence by one owner in pursuance of their order, is conclusive and the statute is not unconstitutional because it does not expressly provide for notice of the meetings of such fence viewers as it contains an implied provision for such notice; nor is the statute unconstitutional because it makes the sum assessed by fence viewers a lien on the land. *Gilson* v. *Supervisor*, 114 Mich. 671 (72 N. W. Rep. 994). N. J. Gen. Stat., Vol. 2, p. 1461 construed and applied—division of partition fences—ownership of materials—adjudication of township committee. *Titman* v. *Smith*, 61 N. J. L. 191 (38 Atl. Rep. 810).

Sec. 354. Fencing railroads—Statutes construed—"Enclosed lands" defined. Only an owner of lands through which the track of a railroad company runs, can maintain an action against such company for failure to comply with Ga. Laws 1889, p. 158, requiring it to construct cattle guards. *Florida Cent. & P. R. Co.* v. *Judge*, 100 Ga. 600 (28 S. E. Rep. 379). A statute (Mont. Acts 1891, p. 267) requiring railroad companies to fence their roads by fences "suitable and amply sufficient to prevent live stock from getting thereon" or else respond in damages for animals killed or injured except when occasioned by the willful act of the owner or his agent and allowing double damages when not paid within thirty days after notice thereof, is constitutional. *Beckstead* v. *Montana Union Ry. Co.*, 19 Mont.

147 (47 Pac. Rep. 795). Neb. Comp. Stat., ch. 72, art. 1, § 1, construed and applied—duty of railroad company as to fencing its track—rights of land owner to recover for the erection of fence. *Chicago B. & Q. R. Co.* v. *Lyon*, 50 Neb. 640 (70 N. W. Rep. 261). For a discussion as to the extent of "depot grounds" or "yard limits" which a railroad may claim as exempt from a statute requiring it to fence its right of way, see *Rabidon* v. *Chicago & W. M. Ry. Co.*, 115 Mich. 390 (73 N. W. Rep. 886; 39 L. R. A. 405).

Construing and applying Va. Code, § 1258, requiring railroads to fence all their road bed running through "enclosed lands," it is held that the term "enclosed lands" means lands surrounded by a tangible obstruction, natural or artificial, which shuts it off as private property; that the fence need not be a lawful fence; and a lessee of several contiguous tracts belonging to different owners, need not maintain partition fences between them in order to bring the land within the meaning of the statute. *Kimball* v. *Carter*, 95 Va. 77 (27 S. E. Rep. 823; 38 L. R. A. 570). The court say: "The term 'inclosed lands' is to be interpreted in accordance with the common and ordinary definition of the words used, there being nothing whatever to indicate that they were otherwise employed. Webster defines 'enclosed' or 'inclosed,' applied to lands, as 'separate from the common grounds by a fence;' citing Blackstone. Worcester defines it: 'To part off or shut in by a fence; to set off as private property,'—citing London Enc. A fence is defined to be 'an inclosure about a field or other space, or about any object; especially an enclosing structure of wood, iron, or other material, intended to prevent intrusion from without or straying from within.' Webst. Dict. 'A line of obstacle, as a frame of wood, a wall, hedge, or ditch interposed between two portions of land for the purpose of preventing cattle from going astray, or for protecting a field or property from unlawful encroachment.' Worcester, Dict. The supreme court of Vermont, in *Porter* v. *Aldrich*, 39 Vt. 326 (cited in 6 Am. & Eng. Enc. Law, at page 639), says: 'The word "inclosure" imports land enclosed with something more than the imaginary boundary line. There should be some visible or tangible obstruction, such as a fence, hedge, ditch, or something equiv-

alent, for the protection of the premises against encroachment by cattle.' And in *Biggerstaff* v. *Railway Co.*, 60 Mo. 567, it is said: 'Where a statute requires railroad companies to fence their tracks along "inclosed or cultivated fields," it is not necessary that, in order to be entitled to this protection, the enclosure of the fields should be by lawful fences.' This meaning was adopted in *Taylor* v. *Welbey*, 86 Wis. 42, cited in 6 Am. & Eng. Enc. Law, p. 688. Inclosed lands, therefore, are lands surrounded by a fence; and a fence is a visible or tangible obstruction which may be a hedge, ditch, wall, or a frame of wood, or any line of obstacle interposed between two portions of land so as to part off and shut in the land, and set it off as private property." Florida has a new statute covering the subject of fencing railroads. Laws 1899, p. 98.

Sec. 355. Farm crossings over railroads—Cattle guards. Construing and applying Miss. Code 1892, § 3561, which requires railroad companies "to make and maintain" suitable crossings for plantation roads, it is held that where a railroad company constructs a proper crossing within a reasonable time after having received authoritative information of the right of the land owner to have a crossing, it will not be required to pay the penalty provided for by the statute. *Alabama & V. Ry. Co.* v. *Odeneal*, 74 Miss. 827 (21 So. Rep. 52). Citing, *McDowell* v. *Railroad Co.*, 37 Barb. 198; *Spinner* v. *Railroad Co.*, 67 N. Y. 156. Ky. Stat. 1894, §§ 1791–1797, construed and applied—fencing railroads—erecting cattle guards. *Younger* v. *Louisville & N. R. Co.*, Ky. (41 S. W. Rep. 25). Tex. Rev. Stat. 1895, arts. 4523–4527, construed and applied—construction of cattle guards by railroad company. *St. Louis S. W. Ry. Co.* v. *Blackwell*, Tex. Civ. App. (40 S. W. Rep. 860). Ind. Rev. Stat., § 5320—right of landowner to construct and maintain wagon and drive way over railroad right of way, amended Laws 1899, p. 485.

FIXTURES.

EPITOME OF CASES.

Sec. 356. Personal property attached to real estate—Effect of contract reserving title or chattel mortgage to secure purchase price. In the recent case of *Wickes Bros.* v. *Hill*, 115 Mich. 333 (73 N. W. Rep. 375), the supreme court of Michigan say: "The rule is settled beyond controversy in this state that, as to conditional sales of personal property retaining the title in the vendor until paid for, no subsequent vendee obtains the title while the property remains personalty. This is upon the theory that the possession of movable property, known as chattels, is not conclusive of ownership or right of possession, and that he who buys takes subject to the title of the real owner. When personal property is attached to, and becomes a part of, the realty, a different rule applies. Title of record and possession of real estate are usually conclusive, and a *bona fide* holder takes title free from any existing equities. As between the original vendor and vendee, no title passes, and as between them the vendee cannot make it realty contrary to his agreement. In such cases the intention of the parties must govern. When, however, the vendor sells machinery, which it is well understood may, and, in the absence of agreement, does, become part of the realty by being so attached that it cannot be removed without injury, and thereby places it in the power of his vendee to so attach it, and sell or mortgage to innocent third parties, the better and more just rule is that he must suffer. *Haven* v. *Emery*, 33 N. H. 69; *Voorhees* v. *McGinnis*, 48 N. Y. 278; *Taylor* v. *Collins*, 51 Wis. 123 (8 N. W. Rep. 22); *Machinery Works* v. *Gellentine*, 99 Ind. 525; *Jenks* v. *Colwell*, 66 Mich. 428 (33 N. W. Rep. 528); *Davenport* v. *Shants*, 43 Vt. 546; Ewell, Fixt. 316 *et seq*; *Porter* v. *Steel Co.*, 122 U. S. 267 (7 Sup. Ct. Rep. 1206); *Fryatt* v. *Sullivan Co.*, 97 Mass. 279." The rule laid down in the principal case

is followed by the supreme court of Oregon. *Landigan* v. *Mayer*, 32 Ore. 245 (51 Pac. Rep. 649). But it is held by the supreme court of Washington that "standing finish" consisting of window and door sashes, jambs, trimmings, wainscoting, etc., placed in a house by a contractor under a contract with the owner, that the contractor retains title until they are paid for, do not become fixtures so as to become subject to the lien of a prior mortgage, where they are attached to the building with screws only, and can be removed without injury to it. *German Sav. & L. Soc.* v. *Weber*, 16 Wash. 95 (47 Pac. Rep. 224; 38 L. R. A. 267). Citing with special approval *Tifft* v. *Horton*, 53 N. Y. 377 (13 Am. Rep. 537).

Particular case in which a boiler and engine sold on condition that the title was to remain in the seller until the purchase price was paid was held not to become a fixture on account of being attached to the land. *Lansing Iron & Engine Works* v. *Wilbur*, 111 Mich. 413 (69 N. W. Rep. 667). Where one purchases machinery under an express contract that title is to remain in the seller until the machinery is paid for and places it upon land which he holds under a contract of purchase, such machinery does not pass to the landowner who subsequently takes posssession of the land on account of the purchaser's failure to perform his agreement and before the machinery is paid for. *Palmateer* v. *Robinson*, 60 N. J. L. 433 (38 Atl. Rep. 957). In Texas it is held that a purchaser of land sold under a decree foreclosing a vendor's lien thereon, acquires title to machinery permanently attached to such land as a fixture, as against the holder of a prior recorded chattel mortgage given for the purchase price of such machinery, of which mortgage the purchaser has no actual notice. *Ice, Light & Water Co.* v. *Lone Star Engine & Boiler Works*, 15 Tex. Civ. App. 694 (41 S. W. Rep. 885). The court say: "The weight of authority is that where a third party, without notice of any such agreements, makes a *bona fide* purchase of the realty, and the chattel has been attached thereto as a permanent fixture, in such manner that it cannot be detached without injury to the freehold, he will not be affected by such private agreements of which he had no notice. *Hopewell Mills* v. *Taunton Sav. Bank*, 150 Mass. 519 (23 N. E. Rep. 327; 15 Am. St. Rep. 235; 6 L. R. A.

249); and authorities cited; *Hunt* v. *Iron Co.*, 97 Mass. 279; *Thompson* v. *Vinton*, 121 Mass. 139; *Manufacturiug Co.* v. *Garven*, 45 O.St. 289 (13 N. E. Rep. 498); *Cross* v. *Commission Co.*, 153 Ill. 499 (38 N. E. Rep. 1088; 46 Am. St. Rep. 902, 910, note and authorities cited); *Fifield* v. *Bank*, 148 Ill. 163 (35 N. E. Rep. 802; 39 Am. St. Rep. 166, 172, note and authorities cited); *Pierce* v. *George*, 108 Mass. 78 (11 Am. Rep. 310); *Butler* v. *Page*, 7 Metc. (Mass.) 40 (39 Am. Dec. 757); *Richardson* v. *Copeland*, 6 Gray 536 (66 Am. Dec. 424); *Frankland* v. *Moulton*, 5 Wis. 1; *Smith* v. *Waggoner*, 50 Wis. 161 (6 N. W. Rep. 568)."

Sec. 357. Right to fixtures—Vendor and Vendee—Mortgagor and mortgagee. Particular conveyance of a saw mill site held to pass the machinery as fixtures. *Bemis* v. *First Nat. Bank*, 63 Ark. 625 (40 S. W. Rep. 127). Counters, sideboards, meat block, meat rack and ice box, used in a saloon and grocery business in a building and which were attached thereto, do not pass to a vendee where they are not mentioned in the deed. *Griffin* v. *Jansen*, Ky. (39 S. W. Rep. 43). Movables permanently attached to a factory if the factory is an immovable property are also immovable, and as such are subject to a mortgage bearing upon the whole factory. *New Orleans Canal & Banking Co.* v. *Leeds & Co.*, 49 La. 123 (21 So. Rep. 168). Fixtures actually or constructively annexed to real estate after the execution of a mortgage upon it become a part of the mortgage security, and, while the mortgage is in force, cannot be removed or otherwise disposed of by the mortgagor, or by one claiming under him, without the consent of the mortgagee. *Ekstrom* v. *Hall*, 90 Me. 186 (38 Atl. Rep. 106). Where persons claiming to own land, whose title was subject to a cloud, constructed thereon a wooden opera house resting on sills on the ground, the roof being supported by the sides and iron columns running from the basement to the roof, resting upon a stone and wooden foundation, the stage and furnace being in excavations made in the ground for that purpose, intending to treat such building as a fixture if their title became perfect, and to claim the right to remove it in case their title failed, after the removal of the cloud from their title, mortgaged the

land and its "tenements, hereditaments and appurtenances," it is held that the mortgage covered the opera house. *Miles* v. *McNaughton*, 111 Mich. 350 (69 N. W. Rep. 481). In Washington a recent statute makes it a misdemeanor for "the owner, mortgagor, lessee or occupant," of mortgaged real estate to destroy or remove fixtures thereon, without the written consent of all mortgagees or lien holders. Laws 1899, p. 122.

Sec. 358. Machinery as a fixture—Rights of mortgagor and mortgagee. Mining machinery purchased by a lessee of a mine, the purchase price of which he secures by a chattel mortgage thereon, will be treated as personalty between the lessor and the mortgagee. *Hewitt* v. *General Electric Co.*, 164 Ill. 420 (45 N. E. Rep. 725). Particular case in which a boiler and engine in a mill were held to be fixtures. *Albert* v. *Uhrich*, 180 Pa. St. 283 (36 Atl. Rep. 745). Particular case in which it is held to be a question for the jury as to whether or not a machine was a fixture within the purview of the mechanic's lien law. *American Brick & Tile Co.* v. *Drinkhouse*, 59 N. J. L. 462 (36 Atl. Rep. 1084).

Machinery placed in a factory to replace and repair old machinery, is subject to a purchase money mortgage previously given for the price of the factory. *National Bank* v. *Levanseler*, 115 Mich. 372 (73 N. W. Rep. 399). Machinery permanently attached to land and belonging to the owner thereof, which was used in a manufactory, will be treated as a fixture and pass by a real estate mortgage given by him, although a chattel mortgage was given at the same time upon the machinery for the purpose of insuring against a possible mistake as to its character. *Studley* v. *Ann Arbor Sav. Bank*, 112 Mich. 181 (70 N. W. Rep. 426); *Homestead Land Co.* v. *Becker*, 96 Wis. 206 (71 N. W. Rep. 117). Where the mortgagors of a mill, as a part of the contract under which the loan is procured, agree to place therein the machinery essential to the operation of the mill for the purposes contemplated, such machinery subsequently placed therein, is subject to the lien of the mortgage and will be treated as a fixture between them and their mortgagee. *Appeal of Muehling*, 181 Pa. St. 483 (37 Atl. Rep. 527; 59 Am. St. Rep. 674).

Where a corporation organized to carry on "a general building and wood-working business," purchases and places in its mill, machinery which is adapted to its work, which is more or less securely fastened to the building and remains stationary it will be treated as a fixture in preserving the rights of a mortgagee. *Lee* v. *Hubschmidt Bldg. & Wood-Working Co.*, 55 N. J. Eq. 628 (37 Atl. Rep. 769).

Sec. 359. Right of tenant to remove fixtures. Where a lease stipulated that fixtures erected by the tenant shall be his property and be removed by him, he is entitled to reasonable time after the expiration of the tenancy within which to remove such fixtures. *Chalifoux* v. *Potter*, 118 Ala. 215 (21 So. Rep. 822). A tile floor laid by a tenant in a building for his own convenience, may be removed by him, where he restores the building to its original condition. *Ross* v. *Campbell*, 9 Colo. App. 88 (47 Pac. Rep. 465). A cotton gin placed on leased premises by a tenant, with the intention of removing it, may be removed by him or his successors in title during the tenancy. *Hicks* v. *Blakeman*, 74 Miss. 459 (21 So. Rep. 7). A lessee's covenant to deliver up the premises at the end of the term "and all future erections and additions to or upon the same," is limited in purpose and effect to new buildings erected, or old buildings added to, and cannot be extended so as to deprive the lessee of his right to remove trade fixtures placed by him upon the premises during the term. *Liebe* v. *Nicolai*, 30 Or. 364 (48 Pac. Rep. 172). Citing, *Holbrook* v. *Chamberlin*, 116 Mass. 155 (17 Am. Rep. 146). Machinery which would otherwise be treated as realty, may be treated as personal property, as between lessor and lessee, where there is an express stipulation in the lease to that effect. *Keefe* v. *Furlong*, 96 Wis. 219 (70 N. W. Rep. 1110). An attachment of ornamental bars, complete in themselves when they were brought on the premises, to the floor and wall of a saloon by adjustable screws and angle and stay irons, for the sole purpose of retaining them in their places, and of a beer pump and accompanying pipes to pump beer from a cellar, is not such an annexation as will convert this personalty into realty, so as to become an improvement of the demised premises, within the meaning of a covenant that "improvements

made upon said premises" the lessee should leave undisturbed. *Ames* v. *Trenton Brewing Co.*, 56 N. J. Eq. 309 (38 Atl. Rep. 858.) A tenant may be enjoined from removing a building which he has constructed as an addition to an existing building, fastening it to the old building by permanent and nonadjustable attachments, and in such a manner that neither can be separated from the other without opening both to the weather; the new structure being used for the same purpose as the old, and the use of both for those purposes being necessary to the complete enjoyment of either, the removal of either being practically a destruction of the property for that use, the construction having been made without leave obtained from the owner, and without contract therefor, and with no definite intention to remove the new erection. *Fortescue* v. *Bowler*, 55 N. J. Eq. 741 (38 Atl. Rep. 445). Particular evidence held sufficient to justify a finding that a certain heating plant put into a building by a tenant was, as between him and the landlord, a part of the realty. *Pond & Hasey Co.* v. *O'Conner*, 70 Minn. 266 (73 N. W. Rep. 159). Particular case in which the lessee was held to have the right to remove buildings after the expiration of his lease. *Merriam* v. *Ridpath*, 16 Wash. 104 (47 Pac. Rep. 416).

Sec. 360. Right of tenant to remove fixtures—Effect of taking new lease or renewal of lease. Where a lessee in possession enters into a new lease for a term of years, there is not such a termination of the original lease as will bar his right to remove fixtures previously annexed by him. *Ross* v. *Campbell*, 9 Colo. App. 38 (47 Pac. Rep. 465). A tenant erecting fixtures which cannot be removed without an injury to the freehold, under a lease which gives him the right to remove them, loses this right where he renews the lease for another term without reserving this right and covenants to keep the premises in good repair and deliver possession of them at the expiration of the lease in as good condition as they were when entered upon. *Sanitary Dist. of Chicago* v. *Cook*, 169 Ill. 184 (48 N. E. Rep. 461; 61 Am. St. Rep. 161; 39 L. R. A. 369). The court say: "We have been cited to no case and know of none in which the precise question here presented has been considered by this court. In

Mason v. *Fenn*, 13 Ill. 525, it was said: 'As between landlord and tenant, improvements put on the demised premises by the latter, for purposes of trade or manufacture, and which can be detached without material injury to the estate, may be removed by him before he quits possession.' As to this proposition there can be no doubt. But the great weight of authority seems to be that where, at the expiration of a lease during which trade fixtures have been erected on the premises by the tenant, a new lease is taken of the same premises, containing no reservation of any right or claim of the tenant to the fixtures still remaining on the premises, and without recognizing the right of the tenant to remove them, such fixtures erected under the former lease, can not be removed by the tenant during or at the end of the new lease, notwithstanding his actual possession of the premises has been continuous. *Fitzherbert* v. *Shaw*, 1 H. Bl. 258; *Heap* v. *Barton*, 74 E. C. L. 273; *Thresher* v. *Water-Works Co.*, 2 Barn & C. 608; *Sharp* v. *Milligan*, 23 Beav. 419; *Merritt* v. *Judd*, 14 Cal. 59; *Loughran* v. *Ross*, 45 N. Y. 792 (6 Am. Rep. 173); *Watriss* v. *Bank*, 124 Mass. 571 (26 Am. Rep. 694); *Carlin* v. *Ritter*, 68 Md. 478 (13 Atl. Rep. 370; 16 Atl. Rep. 801; 6 Am. St. Rep. 467); *Hedderich* v. *Smith*, 103 Ind. 203 (2 N. E. Rep. 315; 53 Am. Rep. 509); *Marks* v. *Ryan*, 63 Cal. 107; Tayl. Landl. & Ten., par. 552; Ewell, Fixt. 174, 175; Tyl. Fixt. 437–439; Wood, Landl. & Ten., par. 532. The reason given is 'because the fixtures set up on the premises at the time of the lease are part of the thing demised, and the tenant, by accepting a lease of the kind without reserving his right to the fixtures, has acknowledged the right of his landlord to them, which he is afterwards estopped from denying.'" Md. Pub. Laws, art. 53, has been amended by adding § 27, which provides that, "the right of a tenant to remove fixtures erected by him under one demise or term shall not be lost or in any manner impaired by reason of his acceptance of a new lease of the same premises without any intermediate surrender of possession." Laws 1898, p. 174.

FORCIBLE ENTRY AND DETAINER.

EPITOME OF CASES.

Sec. 361. As to what constitutes forcible entry and detainer. Construing and applying Ga. Penal Code, § 888, which defines forcible entry as "the violently taking possession of land and tenements with menaces, force and arms and without authority of law," it is held that in order to constitute the offense the entry must be accompanied by some act of actual violence or terror directed towards the person in possession; that breaking and entering an unoccupied house in the absence of the person who has previously been in possession and control thereof and who still claimed the right to possession, does not constitute the offense. *Lewis* v. *State*, 99 Ga. 692 (26 S. E. Rep. 496; 59 Am. St. Rep. 255). Construing How. Ann. Mich. Stat., § 4284, which provides that "no person shall make any entry into lands, tenements, or other possessions, but in cases where entry is given by law, and in such cases he shall not enter with force but only in a peaceable manner," it is held that where a tenant's term has been terminated for nonpayment of rent by notice to quit, a peaceable entry by the landlord in the tenant's absence, and a removal of the latter's goods from the premises, does not constitute a forcible entry and the landlord may defend such possession against the tenant if he uses no more force than is necessary. *Smith* v. *Detroit L. & Bldg. Ass'n*, 115 Mich. 340 (73 N. W. Rep. 395; 39 L. R. A. 410). Citing, *Smith* v. *Reeder*, 21 Ore. 541 (2 Ballards' Law of Real Property, §§ 260–263).

Sec. 362. Who may maintain the action. One having merely a possessory right to lands may maintain the action against a mere trespasser. *Kelly* v. *Johnson*, Ind. Ter. (39 S. W. Rep. 852). Construing Ill. Rev. Stat., ch. 57, § 2, giving the right to maintain the action to a grantee holding under a conveyance from "any grantor in posses-

sion," it is held that a conveyance by an owner of land who has improved the same by the erection of buildings, leased it and lives with one of the tenants is a conveyance by a grantor in possession; that the grantee in a trust deed executed by such a grantor may claim the benefit of the statute and may maintain the action against his devisees. The statute does not contemplate the trial of title in the proceedings, but in an action by a grantee he may introduce his deed to show that he is a grantee of one in possession. *Muller* v. *Balke*, 167 Ill. 150 (47 N. E. Rep. 355); *Peters* v. *Balke*, 170 Ill. 304 (48 N. E. Rep. 1012); and in the last case it is held that the action may be maintained against a tenant of a grantor in possession under him. Ill. Rev. Stat., ch. 57, § 2, cl. 2, 8, construed and applied—who may maintain forcible entry and detainer and when the action lies. *Fitzgerald* v. *Quinn*, 165 Ill. 354 (46 N. E. Rep. 287). Mass. Pub. Stat., ch. 175, gives the right to maintain forcible entry and detainer only to "persons entitled to the premises," and where such a person forcibly ousts another from the possession lawfully obtained, the latter cannot maintain the action against him. *Page* v. *Dwight*, 170 Mass. 29 (48 N. E. Rep. 850; 39 L. R. A. 418). See opinion for review of Massachusetts statutes and decisions upon this subject. Construing S. Dak. Comp. Laws, § 6073, providing that an action of forcible entry and detainer may be maintained "when a lessee in person or by subtenant * * * fails to pay his rent for three days after the same shall fall due," it is held that a clause of reentry need not be contained in the lease to authorize the action. The giving of a notice to quit, as provided for by § 6074, is a substitute for the formal demand for the rent, and a payment or tender of the rent by the lessee within three days after the notice is served prevents a forfeiture. *Dakota Hot Springs Co.* v. *Young*, 9 S. Dak. 577 (70 N. W. Rep. 842).

The construction of the Oklahoma statute, given in the case of *Oklahoma City* v. *Hill*, 4 Okla. 521 (see Ballards' Law of Real Property, Vol. V, § 844), is followed in the case of *Chisholm* v. *Weise*, 5 Okla. 217 (47 Pac. Rep. 1086), in which the court say: "Under the statutes of this territory in force when this action was commenced, the action of forcible entry and detainer might be maintained against any person

who committed forcible entry and ouster, even though the latter was the owner of the property, and entitled to immediate possession, if the plaintiff had at the time of the forcible ouster the actual peaceable possession thereof. And an action for the forcible detention of real property may be maintained by one whose complete possession thereof has been ended by the wrongful entry of another, even though such entry was made under claim of a paramount title. The general purpose of the statute does not regard the actual condition of the title to the property, but, where any person is in the peaceable and quiet possession of it, he shall not be turned out by force, by violence, or by terror. The party so using force and acquiring possession may have a superior title, or may have the better right to present possession; but the policy of the law is to prevent disturbances of the public peace, and forbid any person righting himself by his own hands and by violence, and requiring that the party who has obtained possession in this manner shall restore it to the party from whom it has been so obtained. The party out of possession must resort to legal means to obtain possession if he be entitled thereto. A party out of possession, though he may be entitled to the possession, must resort to the law alone to obtain what he claims."

Sec. 363. Sufficiency of complaint. In an action of forcible entry and detainer or of forcible detainer, it is not necessary for the complaint to contain a statement of the particular facts relied upon to constitute the alleged forcible entry or forcible detention, but the complaint is sufficient in this regard if it contains the language of the statute. Okla. Code Civ. Proc., ch. 70, art. 9, § 4, applied. *Richardson* v. *Penny*, 6 Okla. 328 (50 Pac. Rep. 231). Overruling on this point *Rice* v. *West*, Okla. (33 Pac. Rep. 706). Citing, *Barto* v. *Abbe*, 16 Ohio 408; *Brown* v. *Burdick*, 25 O. St. 260; *McAlpin* v. *Purse*, 86 Ga. 271 (12 S. E. Rep. 412). Objection that the plaintiff has no sufficient complaint on file is waived when not made before going to trial. *Lieferman* v. *Osten*, 167 Ill. 93 (47 N. E. Rep. 208; 39 L. R. A. 156).

Sec. 364. Defenses to the action. The pendency of a prior injunction suit between the same parties and concern-

ing possession of the same real property, cannot be pleaded by one of the parties as a defense to an action of forcible entry and detainer. *Richardson* v. *Penny*, 6 Okla. 328 (50 Pac. Rep. 281). A defendant in an action of forcible entry and unlawful detainer cannot defend on the ground that his entry and detention is in the capacity of agent and not in his own right. *Luling* v. *Shepherd*, 112 Ala. 588 (21 So. Rep. 852). Citing, *Greenberg* v. *Lumber Co.*, 90 Wis. 225 (63 N. W. Rep. 93; 28 L. R. A. 489; 48 Am. St. Rep. 911); *Mayer* v. *Building Co.*, 104 Ala. 611 (16 So. Rep. 620; 53 Am. St. Rep. 88; 28 L. R. A. 433); *Perminter* v. *Kelly*, 18 Ala. 716. It is no defense to an action brought by a landlord to have restitution of the premises for nonpayment of rent, under the forcible entry and detainer act of Minnesota (Gen. Stat. 1894, § 6118), for the tenant to show that the landlord has violated a covenant in his lease to keep the premises in good repair, on account of which damages have resulted to the tenant. *Peterson* v. *Kreuger*, 67 Minn. 449 (70 N. W. Rep. 567). Citing, *Van Every* v. *Ogg*, 59 Cal. 563; *Phillips* v. *Port Townsend Lodge*, 8 Wash. 529 (36 Pac. Rep. 476) and cases cited; *Borden* v. *Sackett*, 113 Mass. 214; *Finney* v. *Cist*, 84 Mo. 303 (84 Am. Dec. 82). A mortgagor having an equitable right to redeem from a sale of his property made in pursuance of a power of sale contained in his mortgage, cannot assert such cause of action as an equitable defense to an action of forcible entry and detainer, brought against him by the purchaser, in the municipal court of Duluth, Minn., for restitution after the year to redeem expires, though the statute authorizes that court to try such an action where the title to real estate is involved; and the judgment in that action is not a bar to the equitable action. *Lundberg* v. *Davidson*, 68 Minn. 328 (71 N. W. Rep. 395). Mansf. Ark. Dig., §§ 4170, 4174, construed and applied — when the action may be maintained for the nonpayment of rent—defeat of action by tender of amount due. *Wilcoxen* v. *Hybarger*, Ind. Ter. (38 S. W. Rep. 669). Iowa Code, § 3621, construed and applied—"thirty days peaceable and uninterrupted possession, with the knowledge of the plaintiff, after the cause of action accrued," is a bar to the action. *Heiple* v. *Reinhart*, 100 Ia. 525 (69 N. W. Rep. 871).

Sec. 365. Practice—Statutes construed. The action should not be abated because some of the plaintiffs are infants suing in their own names, where the recovery by other adult plaintiffs might enure to the benefit of all. *Lancaster* v. *Lancaster*, Ky. (41 S. W. Rep. 34). Under the statute of Oklahoma, where it is shown that the plaintiff was in the peaceable and quiet possession of the premises and was dispossessed thereof by force by the defendant, the plaintiff is entitled to recover as damages, double the rental value of the premises for the period the possession was withheld from him. *Chisholm* v. *Weise*, 5 Okla. 217 (47 Pac. Rep. 1086). See, *City of Oklahoma City* v. *Hill*, 6 Okla. 114 (50 Pac. Rep. 242). Upon the trial of an action for unlawful entry, under Ga. Code, § 4072, title to the premises in dispute is not involved, except in so far as it bears upon the question of possession and the *bona fides* of the entry; and where one is in possession of a portion of a tract of land under a deed, claiming it in good faith, which, though not good as title, is nevertheless good as color, the entry of another upon the same premises in bad faith, without the consent of the person so in possession, is unlawful, and he may be evicted as an intruder, even though he may have entered under a pretended claim of title. If the claim of title be vicious, because it is made in bad faith, this leaves him still an intruder, and subject to eviction as such. *Thorpe* v. *Atwood*, 100 Ga. 597 (28 S. E. Rep. 287). Title cannot be tried in an action brought under Ill. Rev. Stat., ch. 57, § 2. *Palmer* v. *Frank*, 169 Ill. 90 (48 N. E. Rep. 426); *Muller* v. *Balke*, 167 Ill. 150 (47 N. E. Rep. 355.) Construing Nev. Gen. Stat., § 4697, providing that "offenses recognized by the common law and not herein enumerated shall be punished," it is held that forcible entry may be punished as a misdemeanor as it was recognized as such by the common law. *Ex parte Webb*, Nev. (51 Pac. Rep. 1027). Citing, 2 Bish. New Cr. Law, § 492; *Harding's Case*, 1 Greenl. 22; 4 Bl. Comm. 148; *Cruiser* v. *State*, 18 N. J. L. 206. S. Dak. Comp. Laws, §§ 6072–6077, construed and applied—jurisdiction—sufficiency of complaint. *Browne* v. *Haseltine*, 9 S. Dak. 524 (70 N. W. Rep. 648). Utah Comp. Laws 1888, §§ 3787, 3801, construed and applied —when the action may be maintained—recovery of treble

damages. *Eccles* v. *Union Pac. Coal Co.*, 15 Utah 14 (48 Pac. Rep. 148). W. Va. Code. 1891, ch. 50, § 212, applied—sufficiency of summons—allegation as to "unlawful withholding"—description of premises. *Simpkins* v. *White*, 43 W. Va. 125 (27 S. E. Rep. 861). The liability of sureties upon a bond given by a defendant in order to retain possession after the issuance of a provisional writ of restitution, under Wash. Laws 1891, p. 188, is not affected by the subsequent giving of an appeal bond, or by subsequent amendments in the complaint which do not change the cause of action, nor by the giving of an additional bond by the defendants for the same purpose. *Lowman* v. *West*, 18 Wash. 233 (51 Pac. Rep. 373). Mass. Pub. Stat., ch. 175, § 1—when the action will lie—amended, Laws 1899, p. 58.

FRAUDULENT CONVEYANCES.

EPITOME OF CASES.

Sec. 366. Conveyance for support of grantor. Where the recited consideration in a conveyance was that the grantee had cared for the grantor "for twenty years or more in time of sickness and distress," and would, as the grantor believed, "continue to look after" his wants during the balance of his life, it will not be set aside at the instance of one who subsequently asserts a claim for damage against the grantor for breach of an alleged marriage contract of which claim the grantor had no knowledge until after the execution of the conveyance. *Gregory* v. *Lamb*, Ky. (42 S. W. Rep. 339). Where the consideration for a conveyance is an agreement for future support of the grantor, the transaction is fraudulent in law as to his creditors, to the extent which the value of the property is in excess of the support actually furnished by the grantee in good faith. *Harris* v. *Brink*, 100 Ia. 366 (69 N. W. Rep. 684; 62 Am. St. Rep. 578). The court say: "The authorities proceed upon the theory that it is the legal duty of a debtor to pay his debts

rather than to provide for his future support, and that existing creditors may avail themselves of property conveyed for future support for the payment of their claims, when the debtor has no other property out of which payment can be enforced. *Walker* v. *Cady*, 106 Mich. 21 (63 N. W. Rep. 1005); *Kelsey* v. *Kelley*, 63 Vt. 41 (22 Atl. Rep. 597; 13 L. R. A. 640); *Farlin* v. *Sook*, 30 Kan. 401 (1 Pac. Rep. 123; 46 Am. Rep. 100); *Henry* v. *Hinman*, 25 Minn. 199; *Faber* v. *Matz*, 86 Wis. 370 (57 N. W. Rep. 39). And where the parties have acted in good faith, the conveyance may be sustained so far as the consideration paid by the grantee without notice is involved, but will be set aside as to any value in the property in excess of the amount paid; and in such case the grantee is chargeable with the value of the use of the property. *Loos* v. *Wilkinson*, 110 N. Y. 195 (18 N. E. Rep. 99); *Gould* v. *Hurto*, 61 Ia. 45 (15 N. W. Rep. 588); *Redhead* v. *Pratt*, 72 Ia. 99 (33 N. W. Rep. 382); *Gaar Scott & Co.* v. *Hart*, 77 Ia. 597 (42 N. W. Rep. 451)."

Sec. 367. Conveyances in fraud of marital rights. A husband's conveyance cannot be assailed by the wife on the ground that it will defeat the collection of her contingent claim for alimony in a threatened divorce suit which she has not begun and which she does not allege she has any ground for beginning. *Ullrich* v. *Ullrich*, 68 Conn. 580 (37 Atl. Rep. 393). A deserted wife, entitled to sue her husband for maintenance of herself and child, under Cal. Civ. Code, § 137, is his creditor within the meaning of § 3439, and may maintain an action to set aside a deed made by him for the purpose of defrauding her of her right for maintenance. She has this right although the conveyance was executed by her husband prior to the marriage, it appearing that at the time of the transfer they were cohabiting under an agreement of marriage and she was with child by him and therefore in no position to exercise a fair option whether she would fulfill her engagement with him or not. *Murray* v. *Murray*, 115 Cal. 266 (47 Pac. Rep. 37; 56 Am. St. Rep. 97; 37 L. R. A. 626). Citing, *Green* v. *Adams*, 59 Vt. 602 (10 Atl. Rep. 742; 59 Am. Rep. 761); *Tyler* v. *Tyler*, 126 Ill. 525, 537 (21 N. E. Rep. 616; 9 Am. St. Rep. 642); *Stuart* v. *Stuart*, 128 Mass. 370. If a

wife has the right to assail her husband's conveyance for fraud, because it impairs his ability to perform his obligation to support her, a complaint by her for that purpose is insufficient, which does not allege that the husband has failed, neglected or refused to furnish suitable and proper support, nor that the conveyance in question has lessened or diminished in any way his present or future ability or capacity to furnish such support. *Ullrich* v. *Ullrich*, 68 Conn. 580 (37 Atl. Rep. 398.)

Sec. 368. Conveyances between husband and wife. Except as against existing creditors and as against those to whom he contemplates becoming indebted, a husband may gratuitously convey his property to his wife. *Lavigne* v. *Tobin*, 52 Neb. 686 (72 N. W. Rep. 1040.) A gift of real estate by a husband to his wife, cannot be assailed by one who becomes a creditor of the husband several years thereafter, although the wife was not present when the deed was executed nor consulted about the transaction. *Goodfellow* v. *Le May*, 15 Wash. 684 (47 Pac. Rep. 25). The sale of property belonging to a wife, but held and managed by her husband, in his name, and the conversion of the proceeds into property held by her in her name, is not a fraud upon a creditor of the husband, who acquired his claim after the sale of the property, there being no proof of any act of fraud or concealment, or that the creditor changed his position on the faith of the husband's supposed ownership of the property. *Hall* v. *Warren*, Ariz. (48 Pac. Rep. 214). A deed from an insolvent married man to his wife, founded upon no other consideration but a contract previously made between them, by the terms of which she was to perform the ordinary household duties of a wife, for which he was to pay her a stipulated sum per annum, is, as to the creditors of the husband whose claims were in existence at the time of the execution of the deed, voluntary and therefore void. *Lee* v. *Savannah Guano Co.*, 99 Ga. 572(27 S. E. Rep. 159; 59 Am. St. Rep. 248). Where a business conducted by a husband with his wife's capital is in fact his own, property purchased with the profits of such business and conveyed to his wife may be subjected to the claims of his creditors. *Murphy* v. *Nilles*, 166 Ill. 99 (46 N. E. Rep. 772). A conveyance from a hus-

band to his wife claimed by them to be made in payment of a debt due from him to her, will not be sustained against his creditors by the uncorroborated testimony of the husband and wife as to the existence of the debt. *Sanford* v. *Allen*, Tenn. (42 S.W.Rep.183). A conveyance to a wife of lands purchased by her, will not be set aside as fraudulent as to her husband's creditors, because a portion of the purchase money was paid out of money which the wife had saved of the allowance made from time to time by her husband for the support of the family. *Green* v. *Buckler*, Ky. (40 S. W. Rep. 382). The simple failure to record a conveyance of real property does not of itself render the instrument fraudulent as to creditors, but it is one circumstance which, in connection with others, may avoid the deed. Where the instrument is a voluntary conveyance from husband to wife, and it is withheld from record until after equities of the husband's creditors without notice attach to the property, either by reason of some lien, or because of credit extended upon the faith of the grantor's possession and apparent ownership of record of the property conveyed, the conveyance will be invalid as against such creditors. *American Freehold Land & Mortg. Co.* v. *Maxwell*, 39 Fla. 489 (22 So. Rep. 751). Citing, *Fetters* v. *Duvernois*, 73 Mich. 481 (41 N. W. Rep. 514); *Coates* v. *Gerlach*, 44 Pa. St. 43; Wait, Fraud. Conv., § 235; *Warner* v. *Watson*, 35 Fla. 402 (17 So. Rep. 654). Particular conveyance from husband to wife held fraudulent as to his creditors. *Preston Nat. Bank* v. *Pierson*, 112 Mich. 435 (70 N. W. Rep. 1013; *Carkeek* v. *Boston Nat. Bank*, 16 Wash. 399 (47 Pac. Rep. 884); *Sanford* v. *Allen*, Tenn. (42 S. W. Rep. 183); *Dillman* v. *Nadelhoffer*, 162 Ill. 625 (45 N. E. Rep. 680). Particular conveyance from husband to wife held not to be a fraud upon his creditors. *Stonebraker* v. *Hicks*, 94 Va. 618 (27 S. E. Rep. 497); *Spence* v. *Repass*, 94 Va. 716 (27 S. E. Rep. 588). Particular transactions between husband and wife held to constitute a fraud upon his creditors. *Thomas* v. *McDaneld*, 102 Ia. 564 (71 N. W. Rep. 572); *Township of Maple Valley* v. *Foley*, 113 Mich. 622 (71 N. W. Rep. 1086); *Shepherd* v. *Reeves*, 114 Ala. 281 (21 So. Rep. 956); *Darling* v. *Hanks*, Ky. (42 S. W. Rep. 1130).

Sec. 369. Conveyances between husband and wife—Presumptions — Burden of proof. A conveyance by an insolvent husband to his wife will be presumed fraudulent as to his creditors, and the mere recital in the deed of a valuable consideration without any proof of actual payment thereof, is insufficient to rebut this presumption. *Redmond* v. *Chandley*, 119 N. C. 575 (26 S. E. Rep. 255). In Nebraska it is held that when a conveyance from a husband to a wife or from a wife to a husband is attacked by his or her creditor, whose claim existed at the time the conveyance was made, the presumption will be indulged that such conveyance was fraudulent and the burden rests upon the husband or wife, as the case may be, of showing the good faith of the transaction. *Kirchman* v. *Corcoran*, 51 Neb. 191 (70 N. W. Rep. 916); *Jansen* v. *Lewis*, 52 Neb. 556 (72 N. W. Rep. 861). Where, in an action to subject property conveyed to a wife to the payment of her husband's debts, it appears from the evidence that he could not have furnished the funds with which to purchase it, and that she was engaged in a business the resources of which would enable her to make such purchase, the presumption that the husband furnished the money is overcome. *Kinnier's Adm'r* v. *Woodson*, 94 Va. 711 (27 S. E. Rep. 457).

Where a conveyance by a husband to his wife is assailed for fraud by his creditors, the burden is upon her to show by clear and satisfactory evidence, the good faith of the transaction. *Darden* v. *Ferguson*, Va. (27 S. E. Rep. 485); *Spence* v. *Repass*, 94 Va. 716 (27 S. E. Rep. 583); *American Freehold Land & Mortg. Co.* v. *Maxwell*, 39 Fla. 489 (22 So. Rep. 751). The same rule applies where the contest is over property purchased by the wife in her name during her husband's insolvency. *Kahn* v. *Weinlander*, 39 Fla. 210 (22 So. Rep. 653); *Crump* v. *Johnson*, Tenn. (40 S. W. Rep. 78). Where a conveyance from a husband to wife is assailed as a fraud upon the equitable rights of his creditors, although she paid a valuable consideration, the burden is on her to show that she took without notice of their rights, although Mont. Comp. Stat. 1887, div. 5, § 232, pertaining to conveyances provides that "the provisions of this chapter shall not be construed in any manner to affect or

impair the title of a purchaser for a valuable consideration, unless it shall appear that such purchaser had previous notice of the fraudulent intent of his immediate grantor or of the fraud rendering void the title of such grantor." *Lewis* v. *Lindley*, 19 Mont. 422 (48 Pac. Rep. 765). When a husband appropriates his own money to erecting buildings upon his wife's land with her consent, the increment of value thereby created can be taken by his prior creditors through proceedings in equity, even though there was no actual intent to defraud such creditors; and when a wife receiving from time to time her husband's income, first invests it in her separate business, and then pays the family expenses out of that business, the burden is upon her, as against his prior creditors, to show affirmatively the amount actually consumed in such expenses. *Trefethen* v. *Lynam*, 90 Me. 376 (38 Atl. Rep. 335; 60 Am. St. Rep. 271; 38 L. R. A. 190).

Sec. 370. Conveyances between near relatives. The fact that liens given by a debtor to his near relatives are held by them for a long time without seeking their enforcement, does not, of itself, show that they were fraudulently executed. *Norton* v. *Reed*, Tenn. (42 S. W. Rep. 688). A conveyance by a father to his daughter in discharge of a *bona fide* debt due her for support furnished him, will not be held fraudulent. *Citizens' State Bank* v. *Weston*, 103 Ia. 736 (72 N. W. Rep. 542). The moral obligation of an alleged fraudulent grantor arising from the performance of service by members of his family, without contract or agreement that they should be paid therefor, is not a sufficient consideration for a transfer of a part of his property to them without retaining sufficient property to pay his existing debts. *Fair Haven Marble & M. S. Co.* v. *Owens*, 69 Vt. 246 (37 Atl. Rep. 749); *Dodson* v. *Severs*, 54 N. J. Eq. 305 (38 Atl. Rep. 28). A conveyance by one heavily in debt to members of his own family, who are acquainted with his financial condition and who have neither money nor property with which to meet their obligations given for the conveyance, will be set aside as fraudulent. *Gamet* v. *Simmons*, 103 Ia. 163 (72 N. W. Rep. 444). An absolute conveyance by a failing debtor to his uncle and a lease back to the debtor openly

made and recorded for the purpose of securing a *bona fide* indebtedness to the grantee who is guilty of no fraud, will not be held fraudulent. *Cathcart* v. *Grieve*, 104 Ia. 330 (73 N. W. Rep. 835). Where a conveyance from a debtor to a member of his family is assailed as fraudulent by his creditors, the burden of showing good faith in the transaction is upon the defendant. *Lavelle* v. *Clark*, Ky. (38 S. W. Rep. 481). Particular conveyance by mother to son in consideration of love and affection and his agreement to pay certain debts of hers and support her during life, held to be fraudulent as to creditors. *Hazlewood* v. *Forrer*, 94 Va. 703 (27 S. E. Rep. 507). Particular transactions held to be a fraud upon creditors; between father and son, *Chatterton* v. *Mason*, 86 Md. 236 (37 Atl. Rep. 960); between the widow and the heirs of a decedent, *Ranson* v. *Brinkerhoff*, 56 N. J. Eq. 149 (38 Atl. Rep. 919); between members of a family, *Martin* v. *Berry*, 116 Ala. 238 (22 So. Rep. 493). For particular transactions between members of a family held not to be fraudulent as to creditors, see *Coyne* v. *Sayre*, 54 N. J. Eq. 702 (36 Atl. Rep. 96); *Torrey Cedar Co.* v. *Eul*, 95 Wis. 615 (70 N. W. Rep. 823); *Williams* v. *Tye*, Ky. (42 S. W. Rep. 90); *Kincaid* v. *Irvine*, 140 Mo. 615 (41 S. W. Rep. 963).

Sec. 371. Reconveyance by fraudulent grantee to his grantor. The moral obligation resting upon a grantee to whom property has been conveyed to defraud his grantor's creditors, imposed by his agreement to reconvey to such grantor, is sufficient consideration to sustain an executed conveyance by him to his grantor, and such a conveyance gives the latter a title superior to the rights of the creditor of his original grantee, who extended credit on the faith of the latter's ownership of the property but did not acquire any lien on the land. *Biccochi* v. *Casey-Swasey Co.*, 91 Tex. 259 (42 S. W. Rep. 963; 66 Am. St. Rep. 875). Citing, *Clark* v. *Rucker*, 7 B. Mon. 583; *Powell* v. *Ivey*, 88 N. C. 256; *Stanton* v. *Shaw*, 8 Baxt. 12; *Davis* v. *Graves*, 29 Barb. 480; Wait, Fraud. Conv., §§ 387–398; Bump, Fraud. Conv., p. 224; *Petty* v. *Petty*, 31 N. J. Eq. 14; *Irion* v. *Mills*, 41 Tex. 310.

Sec. 372. As to what constitutes a fraudulent conveyance—Particular cases. A conveyance by an insolvent

debtor is not a fraud upon his creditors where the grantee assumes the payment of their claims. *Old Nat. Bank* v. *Heckman*, 148 Ind. 490 (47 N. E. Rep. 953). A conveyance made and accepted with an intention to defraud creditors will be held void as to them, although the grantee paid a valuable consideration therefor. *Conley* v. *Buck*, 100 Ga. 187 (28 S. E. Rep. 97). Where debtors for the purpose of defeating their creditors enter into a fraudulent agreement with a landowner, whereby they gratuitously furnish him with materials for the erection of improvements on his real estate, their creditors may have a lien thereon to the extent of the materials so furnished. *People's Nat. Bank* v. *Loeffert*, 184 Pa. St. 164 (38 Atl. Rep. 996). A testator's widow to whom he has devised all of his property during her widowhood with full power and authority to dispose of the same by her last will and testament in any manner she may think proper, cannot exercise such power in favor of volunteers to the exclusion of her creditors. *Freeman's Adm'r* v. *Butters*, 94 Va. 406 (26 S. E. Rep. 845). The fact that a conveyance executed by an insolvent to one to whom he occupied the position of parent, was in discharge of a promise not legally binding on him, will not render it valid, where the other facts surrounding the transaction are such as to show that it was a fraud upon his creditors. *Gamet* v. *Simmons*, 103 Ia. 163 (72 N. W. Rep. 444). Where one holding the legal title to lands in trust for another, although in a manner not authorized by the statute, executes the trust by a conveyance of the lands to his beneficiary, before his creditors acquire any lien thereon, they cannot assail such conveyance for fraud, all the parties thereto having acted in good faith, it not appearing that they extended credit to him in reliance upon his ownership of the property. Wis. Rev. Stat., § 2090, construed. *Strong* v. *Gordon*, 96 Wis. 476 (71 N. W. Rep. 886).

Sec. 373. Voluntary conveyances. In the absence of actual fraud, a voluntary conveyance will be sustained, where, at the time of its execution, the debtor retains sufficient property to pay all his existing debts. *Fair Haven Marble & M. S. Co.* v. *Owens*, 69 Vt. 246 (37 Atl. Rep. 749). The voluntary conveyance by a debtor corporation of

all its property to another corporation owned by the same stockholders, may be avoided by the grantor's creditors. *Mason* v. *Fischer & Burnett Lum. Co.*, Miss. (21 So. Rep. 5). Where the judgment of a creditor, taken after the execution of a fraudulent conveyance by his debtor, embraces several items of indebtedness, some of which accrued after the conveyance was made and recorded, it will be held void only as to that part of the debt incurred before its execution. *Cole* v. *Brown*, 114 Mich. 396 (72 N. W. Rep. 247). A failing debtor's conveyance to his wife to pay a debt, will be treated as voluntary to the extent the value of the property exceeds the debt. *Hansen* v. *Gregory*, Ia. (78 N. W. Rep. 478). A voluntary conveyance by a husband to his wife is void as to his creditors. The fact that a conveyance from a husband to his wife is made in pursuance of a verbal antenuptual agreement between them which is void under the statute of frauds, does not show such a consideration as will allow such conveyance to prevail over the rights of his creditors acquired while the property was in him. *Keady* v. *White*, 168 Ill. 76 (48 N. E. Rep. 814). Applying Md. Code, art. 45, § 1, which makes a voluntary conveyance from a husband to his wife void as against existing creditors, it is held that it is not error for a court on setting aside such a conveyance to decree it "absolutely null and void to all intents and purposes whatsoever," where it is further directed by the decree that the property be sold and the proceeds be brought into court to be distributed under its direction. *Norberg* v. *Ricords*, 84 Md. 568 (36 Atl. Rep. 116).

Sec. 874. Insolvency of debtor as affecting his deed —What constitutes insolvency. Where prior creditors assail their debtor's mortgage as fraudulent, which has been given for a valuable consideration, they must show that he was embarassed financially at the time of its execution, of which fact the mortgagee had notice or knowledge of facts calculated to put him on inquiry. *Roden* v. *Ellis*, 118 Ala. 652 (21 So. Rep. 71). In discussing what constitutes insolvency and its effect upon a voluntary conveyance by a debtor, the supreme court of Georgia, in the case of *Cohen* v. *Parish*, 100 Ga. 335 (28 S. E. Rep. 122), say: "In the case of

Powell v. *Westmoreland*, 60 Ga. 572, it was held that 'notes and accounts and other evidences of debt are property, and should be counted as such in the issue of the solvency or insolvency of the grantor or donor.' This being true, it follows necessarily that cash in hand, whether coin, currency, or bank notes, is also property, to be counted in determining the question of solvency or insolvency. 'Insolvency,' as applicable to a case of this kind, has been similarly defined by other courts and text writers. 'Insolvency, then, is the inadequacy of the debtor's means, with all of his whole means or resources (including not only money or its equivalent, but property in its most extensive sense), for the payment of all his debts. Debts are paid with property; and so long as a debtor is in possession of means of any kind with which or out of which he can himself at once discharge all liabilities in full, or out of which his creditors can collect their debts by legal process, it is hardly necessary to say that he cannot be considered insolvent, in the sense now under consideration.' Burrill, Assignm. § 43; *Herrick* v. *Borst*, 4 Hill 650. In the case of *Toof* v. *Martin*, 13 Wall. 40, Mr. Justice Field, in the opinion, says: 'The term "insolvency" is not always used in the same sense. It is sometimes used to denote the insufficiency of the entire property and assets of an individual to pay all his debts. This is its general and popular meaning.' 'Insolvency is the inadequacy of a man's funds to the payment of his debts.' Wait, Insol. Corp., p. 41, § 29. See, also, Bouvier's and Anderson's Law Dictionaries, 'Solvency' and 'Insolvency'; and the same in 11 and 12 Am. & Eng. Enc. Law. It is needless to multiply authorities. If the property of a person, whether real or personal, tangible or intangible, leviable or nonleviable, be in value more than sufficient to discharge all his debts, such person can in no proper sense be termed an 'insolvent.' But, while such person would not be insolvent, still, if, by a voluntary conveyance, he should deprive himself of all property which would be subject to legal process, such conveyance, as to creditors, would be *prima facie* fraudulent; and it would be incumbent on the grantee to show, not only that the grantor was solvent, but that the conveyance was made in good faith and not with the intention to hinder, delay, or defraud his creditors. *Cothran* v. *Forsyth*, 68 Ga.

[illegible]." Particular evidence held insufficient to show that a corporation was insolvent. *In re Bloomfield Woolen Mills*, [illegible] Ia. 181 (70 N. W. Rep. 115). Md. Code, art. 47, § 24, construed and applied—deeds executed in contemplation of insolvency. *Applegarth* v. *Wagner*, 86 Md. 468 (38 Atl. Rep. 940).

Sec. 375. Preference of creditors. An insolvent or failing debtor may pay or secure one or more of his creditors to the exclusion of others equally meritorious, even if, by so doing, he exhausts the whole of his property. *Vietor* v. *Glover*, 17 Wash. 87 (48 Pac. Rep. 788; 40 L. R. A. 297); *Kincaid* v. *Irvine*, 140 Mo. 615 (41 S. W. Rep. 968); *Johnson* v. *Johnson*, 101 Ia. 405 (70 N. W. Rep. 598). The preference may be made by the giving of a mortgage. *Union Nat. Bank* v. *State Nat. Bank*, 168 Ill. 256 (48 N. E. Rep. [illegible]); *McMorran* v. *Moore*, 118 Mich. 101 (71 N. W. Rep. [illegible]); *Cathcart* v. *Grieve*, 104 Ia. 330 (73 N. W. Rep. 835); *Johnson* v. *Johnson*, 101 Ia. 405 (70 N. W. Rep. 598). An instrument creating a preference is not affected by the motive of the debtor where the creditor taking it has done nothing improper. *Union Nat. Bank* v. *State Nat. Bank*, 168 Ill. 256 (48 N. E. Rep. 169); *Johnson* v. *Johnson*, 101 Ia. 405 (70 N. W. Rep. 598). A trust deed executed to prefer a creditor is not invalidated by the fact that it was executed by the grantor and received by the grantee as trustee with an intent to prevent a prosecution of the grantor for a felony in his transactions with creditors of which the preferred creditor had no notice. *Jones* v. *Cullen*, 100 Tenn. 1 (42 S. W. Rep. 873). Where a conveyance giving a preference is for the security of several claims, some of which are fraudulent, it will be sustained in favor of those which are valid. *Vietor* v. *Glover*, 17 Wash. 87 (48 Pac. Rep. 788; 40 L. R. A. 297). A failing or insolvent debtor having the right to prefer creditors, may prefer his relatives who are his *bona fide* creditors; but the burden is upon them to show good faith in the transaction. *National Bank of Commerce* v. *Chapman*, 50 Neb. 484 (70 N. W. Rep. 39). The wife of a failing debtor may be his preferred creditor. *Sprague* v. *Benson*, 101 Ia. 678 (70 N. W. Rep. 781); *Heiney* v. *Lontz*, 147 Ind. 417 (46 N. E. Rep.

665). And so may his children. *Citizens' State Bank* v. *Weston*, 108 Ia. 736 (72 N. W. Rep. 542).

Construing Hill's Ann. Or. Laws, § 3178, providing that "no general assignment of property by an insolvent or in contemplation of insolvency shall be valid unless it shall be made for the benefit of all the creditors in proportion to the amount of their respective claims," it is held that the provisions of the statute are confined to general assignments for the benefit of creditors made by an insolvent debtor or in contemplation of insolvency, and the statute does not affect the common law right of a debtor to prefer one creditor to another, if done in good faith. *Ladd* v. *Johnson*, 32 Or. 195 (49 Pac. Rep. 756). Citing, *Inman, Poulsen & Co.* v. *Sprague*, 30 Or. 321 (47 Pac. Rep. 826); *Sabin* v. *Wilkins*, 31 Or. 450 (48 Pac. Rep. 425); *Loomis* v. *Stewart*, 75 Ia. 387 (39 N. W. Rep. 660); *Campbell* v. *Iron Co.*, 9 Colo. 60 (10 Pac. Rep. 251). Applying Minn. Gen. Stat. 1894, § 4243, it held that to render a conveyance voidable under this statute on account of its being made to prefer creditors, an intent on the part of the debtor to give or allow a preference to one creditor over others must be shown. A conveyance of or lien upon land cannot be avoided by a purchaser of the property from an assignee in insolvency on account of its constituting a preference in violation of the statute. This can only be done by the assignee or receiver himself by legal proceedings instituted for that purpose. *Fisher* v. *Utendorfer*, 68 Minn. 226 (71 N. W. Rep. 29). It cannot be held as a matter of law, that because a technically insolvent merchant or trader suffers an action to be commenced against him upon a claim against which he has no defense, by creditors who know him to be technically insolvent, and allows a judgment to be entered and docketed against him for want of answer, which judgment becomes a lien upon real property, the debtor intended to permit the judgment creditors to obtain unlawful preference. *Bean* v. *Scheffer*, 68 Minn. 33 (70 N. W. Rep. 854). This case is supported by, *Fisher* v. *Utendorfer*, 68 Minn. 226 (71 N. W. Rep. 29).

Sec. 876. Preference of creditors by partners and corporations. Partners may prefer their creditors the same as other persons. *Victor* v. *Glover*, 17 Wash. 37 (48 Pac.

Rep. 788; 40 L. R. A. 297.) Partners may waive the right to compel partnership assets to be first applied to the payment of partnership debts, and they may transfer or incumber firm property to pay or secure *bona fide* debts of the individual members of the firm, and the transaction cannot be successfully attacked either by a creditor or a receiver appointed by reason of the insolvency of the firm. *Old National Bank* v. *Heckman*, 148 Ind. 490 (47 N. E. Rep. 958). To the same effect is the case of *Victor* v. *Glover*, 17 Wash. 87 (48 Pac. Rep. 788; 40 L. R. A. 297.)

An insolvent corporation has the same rights as an individual to prefer its creditors, *Leavering* v. *Bimel*, 146 Ind. 545 (45 N. E. Rep. 775); *Smith* v. *Wells Mfg. Co.*, 148 Ind. 333 (46 N. E. Rep. 1000); *Mason* v. *Fischer & Burnett Lum. Co.*, Miss. (21 So. Rep. 5); *Wyeth Hardware & Mfg. Co.* v. *James Spencer-Bateman Co.*, 15 Utah 110 (47 Pac. Rep. 604), citing numerous authorities; and instruments giving preferences are not invalidated because they inure to the benefit of some of its directors. *Leavering* v. *Bimel*, 146 Ind. 545 (45 N. E. Rep. 775); *South Bend Chilled Plow Co.* v. *George C. Cribb Co.*, 97 Wis. 230 (72 N. W. Rep. 749); *In re Bloomfield Woolen Mills*, 101 Ia. 181 (70 N. W. Rep. 115). But in New Jersey it is held that a mortgage executed by an insolvent corporation will be held voidable in so far as it gives a preference to a debt owing to one of the acting directors or to a near relative of one of the directors, or to a corporation in which one of the directors is interested, or to secure the payment of an obligation upon which the directors are endorsers. *Savage* v. *Miller*, 56 N. J. Eq. 432 (36 Atl. Rep. 578). Taking into consideration the fact that Wash. Code Proc., § 326, subd. 5, authorizes the courts of that state to appoint receivers of corporations which are insolvent or are in imminent danger of insolvency, and the fact that the property of said corporation is a trust fund for its creditors, it is held that a voluntary preference by an insolvent corporation is void. *Biddle Purchasing Co.* v. *Port Townsend Steel W. & N. Co.*, 16 Wash. 681 (48 Pac. Rep. 407). Citing, *Conover* v. *Hull*, 10 Wash. 673 (39 Pac. Rep. 166; 45 Am. St. Rep. 810).

Sec. 377. Conveyance of real estate exempt from execution. There can be no fraudulent conveyance of property exempt from execution. *Roane* v. *Hamilton*, 101 Ia. 250 (70 N. W. Rep. 181); *Patnode* v. *Darveau*, 112 Mich. 127 (71 N. W. Rep. 1095). Applying the principle that there can be no fraudulent conveyance of property exempt from execution, it is held in Indiana that a husband and wife can convey his real estate, as against his creditors, to an amount equal to one-third of the value thereof, her inchoate interest under Ind. Rev. Stat., 1894, § 2669, together with $600.00 worth additional. *Isgrigg* v. *Pauley*, 148 Ind. 436 (47 N. E. Rep. 821). This case is supported by, *Citizens' State Bank* v. *Harris*, 149 Ind. 208 (48 N. E. Rep. 856).

Sec. 378. Force and effect of a fraudulent conveyance between parties to it. Where there is actual fraud, both parties participating, the deed is utterly void from the beginning and will not be permitted to stand as security for any purpose. *Hazlewood* v. *Forrer*, 94 Va. 703 (27 S. E. Rep. 507). A husband who conveys property to his wife for the purpose of avoiding anticipated claims against him, cannot invoke the aid of a court of equity to obtain a reconveyance. *Poppe* v. *Poppe*, 114 Mich. 649 (72 N. W. Rep. 612). One who has caused title to his property to be taken in the name of his sister in order to defraud his wife, will not be heard to assert that fact in equity to defeat his sister's title after her death. *Tiffany* v. *Tiffany*, 108 Ia. 133 (72 N. W. Rep. 428). A mortgage given to defraud creditors and without consideration, cannot be enforced as against the parties thereto; but a good faith purchaser of it for value without notice may enforce it against the dishonest mortgagor. *Moffett* v. *Parker*, 71 Minn. 189 (73 N. W. Rep. 850). But in Mississippi it is held that where, upon the foreclosure of a mortgage, the mortgagee shows a *prima facie* right to recover on the face of the instrument, the mortgagor cannot defend by showing that it was executed to defraud his creditors. *Barwick* v. *Moyse*, 74 Miss. 415 (21 So. Rep. 238; 60 Am. St. Rep. 512). Where, at the time of the execution of a conveyance of real estate, made and received for the purpose of defrauding the grantor's creditors, and, as a part of the same transaction, the grantee

agrees to pay off certain existing valid prior incumbrances upon the real estate, in a subsequent action by the creditors to cancel the conveyance, in which such grantee is not asked for an accounting as to rents and profits, he cannot have the conveyance stand as a security for the purpose of reimbursing or indemnifying him for moneys paid out upon the prior incumbrances or in payment of taxes; but such a grantee may avail himself of the benefit of the priority of a judgment purchased by him after the execution of the fraudulent conveyance. *Daisy Roller Mills* v. *Ward*, 6 N. Dak. 317 (70 N. W. Rep. 271).

Sec. 379. Rights of subsequent creditors. Upon a review of its previous decisions it is held by the supreme court of Iowa, that a conveyance actually fraudulent as to existing creditors, may not for that reason alone be avoided by subsequent creditors. *Brundage* v. *Cheneworth*, 101 Ia. 256 (70 N. W. Rep. 211; 68 Am. St. Rep. 382). Substantially the same is held in Tennessee. *Nelson* v. *Vanden*, 99 Tenn. 224 (42 S. W. Rep. 5). A conveyance made for an inadequate consideration and with the actual intent on the part of both the grantor and grantee to hinder, delay or defraud creditors of the grantor, will be treated as fraudulent, as against subsequent creditors. *Prestwood* v. *Troy Fertilizer Co.*, 115 Ala. 668 (22 So. Rep. 77). A subsequent creditor attacking a conveyance of his debtor as fraudulent, must show by a preponderance of evidence that such conveyance was made and accepted with a fraudulent intent as to such creditors. *Jansen* v. *Lewis*, 52 Neb. 556 (72 N. W. Rep. 861). Actual fraud must be shown and as well the specific intent to defraud the individual subsequent creditors complaining or subsequent creditors generally. *Cole* v. *Brown*, 114 Mich. 396 (72 N. W. Rep. 247). Contracts and conveyances made between a corporation and its stockholders and promoters which have for their object the application of its property to the payment of their debts, may be set aside by subsequent creditors of the corporation as fraudulent. *Folsom* v. *Detrick F. & C. Co.*, 85 Md. 52 (36 Atl. Rep. 446). Where a conveyance is set aside at the instance of existing creditors, subsequent creditors may also share in the fruits of the division.

O'Brien v. *Stambach*, 101 Ia. 40 (69 N. W. Rep. 1133; 63 Am. St. Rep. 368).

Sec. 380. Setting aside—Who may maintain the action. Where the common law prevails, it is held that the creditor of a debtor who has made an assignment, and not his assignee, has the right to bring an action to set aside a sale of property fraudulently conveyed before the date of the assignment. *Wells* v. *Schuster-Hax Nat. Bank*, 23 Colo. 534 (48 Pac. Rep. 809). Where the grantees in a deed, taking advantage of a weak minded old man's antipathy to one to whom he owed a small sum, induced him by fraudulent schemes to convey property of great value to them, his heirs may set aside the deed, it appearing that the creditors were paid in full from the personal property of the grantor. *Copeland* v. *Long*, Tenn. (41 S. W. Rep. 866). A payee of a note does not lose his right to set aside an endorser's conveyance for fraud upon creditors, by subsequently taking a renewal of the note upon which the fraudulent grantors continue as endorsers. *Preston Nat. Bank* v. *Pierson*, 112 Mich. 485 (70 N. W. Rep. 1013). A creditor taking a mortgage which recognizes the priority of another mortgage cannot assail it as fraudulent upon the mortgagor's creditors for the purpose of giving his mortgage priority; but he may release his right to claim under his mortgage and assail such prior mortgage as a general creditor. *Old Nat. Bank* v. *Heckman*, 148 Ind. 490 (47 N. E. Rep. 953). Taking a judgment on his judgment in a foreign jurisdiction, by a creditor, in order to enable him to file his claim in an assignment proceeding, does not merge the original judgment so that it cannot be the basis of a suit to support a legal action to set aside a fraudulent conveyance made by the debtor before the assignment. *Wells* v. *Schuster-Hax Nat. Bank*, 23 Colo. 534 (48 Pac. Rep. 809).

Sec. 381. Setting aside—Reducing claim to judgment — Exhausting legal remedies. A simple contract creditor of a corporation, who has no lien, cannot come into a court of equity to obtain possession of the assets of the corporation and their application to the satisfaction of his claim or to have transfers of its property set aside upon the ground

of fraud upon creditors, until he has put his demand into judgment and exhausted his remedies at law, unless he shows a state of facts which renders it impossible for him to proceed at law. *Atlas Nat. Bank* v. *John Morgan Packing Co.*, 138 Mo. 59 (39 S. W. Rep. 71). In Illinois it is held that neither the mere insolvency of the debtor nor the danger of a transferring of the property to an innocent purchaser, will except a creditor from the rule requiring him to obtain a judgment on his claim before he can maintain a bill in equity to set aside his debtor's conveyance as fraudulent. *Austin* v. *Bruner*, 169 Ill. 178 (48 N. E. Rep. 449). In Wisconsin a creditor's bill must show that the claim has been reduced to judgment upon which an execution has been returned unsatisfied, at least in part, or that the action is brought in aid of an existing execution levy. *Krouskop* v. *Krouskop*, 95 Wis. 296 (70 N. W. Rep. 475). The rule requiring a creditor to procure an attachment or have a return of *nulla bona* before he could set aside a fraudulent conveyance, has been changed in Kentucky by Laws 1896, Act March 16. *Johnson* v. *Bonfield*, Ky. (40 S. W. Rep. 697). The rule is not enforced in Iowa where the judgment debtor is shown to be insolvent; nor is a creditor required to go out of the state to enforce his claim against property. *O'Brien* v. *Stambach*, 101 Ia. 40 (69 N. W. Rep. 1133; 63 Am. St. Rep. 368). In Illinois a creditor may bring an action to set aside a fraudulent conveyance of his debtor as soon as his claim is reduced to a judgment without waiting for the return of execution *nulla bona*. *Dillman* v. *Nadelhoffer*, 162 Ill. 625 (45 N. E. Rep. 680). A court of equity will not entertain jurisdiction of a bill by a creditor of a deceased fraudulent grantor to set aside his conveyance until such creditor has exhausted his remedies for enforcing his claim through the probate court. *Goodman* v. *Kopperl*, 169 Ill. 136 (48 N. E. Rep. 172.) Although their claims are not in judgment, creditors who have proven their claims against the assignee in insolvency, of their fraudulent debtor, may maintain an action to set aside a fraudulent conveyance made by him, and for the removal of the assignee who participates in the transaction, without any previous demand on the assignee to bring such suit. *Terhune* v. *Sibbald*, 55 N. J. Eq. 236 (37 Atl. Rep. 454). Where under the statu-

tory proceedings in assignments, judgment cannot be rendered on a claim filed with the assignee until after the expiration of the time given for filing exceptions, the mere filing of a claim by a creditor does not constitute a reducing of his claim to judgment, so as to authorize him to maintain a bill to set aside as fraudulent a conveyance by the insolvent debtor. *Austin* v. *Bruner*, 169 Ill. 178 (48 N. E. Rep. 449).

Construing and applying N. M. Insolvency Act 1889, §§ 1, 2, providing that any transfer of property by a debtor in contemplation of insolvency and with the design to prefer one or more of his creditors, shall operate as an assignment of all his property and shall inure to the benefit of all his creditors and that all such transfers as are decreed void are to inure to the benefit of all creditors generally and are to be subject to the control of a court of equity upon a bill filed by any person interested, it is held that if a debtor is insolvent or in contemplation of insolvency and makes a conveyance giving a fraudulent preference, a trust is then created in behalf of all of the creditors and any one or all of them may proceed to have the trust declared and the property proportionately administered without first reducing his claim to a judgment at law. *Early Times Distillery Co.* v. *Zeiger*, N. M. (49 Pac. Rep. 728). The Court say: "Stated as a general proposition, there can be no doubt that the well-settled rule is that if the creditor has a legal remedy, which is plain, adequate and complete, he must exhaust that remedy before he will be allowed admission into a court of equity. He should proceed upon the law side of the court, obtain his judgment, and have execution returned thereon unsatisfied, as a condition precedent to enable him to attack, by a bill in chancery, the fraudulent conveyance of his debtor. While this proposition is true, it is also well settled, by a line of authorities equally convincing and controlling, that if the remedy at law is not plain, adequate and complete, or if the creditor has a trust in his favor, then, in either event, he is not required to go first into a court of law, but may apply in the first instance to a court of equity for relief. The fact that the remedy at law may have been exhausted, or that it is wholly inadequate and incomplete, may be, and is, clearly and conclusively shown by the judgment, execution, and return of *nulla bona*. The judg-

ment, execution and return are but the best evidence of these facts; but they are not the only method or the only evidence by which it may be shown that the remedy at law is wholly inadequate and incomplete. If the bill upon its face contains such allegations of fact that the court is enabled to see that there is no remedy at common law, or that the remedy at law is wholly inadequate or incomplete, or if the allegations of the bill show that the creditor has, or claims a trust in his favor, or is seeking to establish his claim as against the trust property, and that the relief can only be made available in a court of chancery, then, upon such a case being made by the bill, the court will not require him in the first instance to hazard his chances of recovery by a useless expenditure of time in obtaining an empty judgment and fruitless execution, as a condition precedent to entertaining his bill." The court cite, *Case* v. *Beauregard*, 101 U. S. 688; *Consolidated Tank-Line Co.* v. *Kansas City Varnish Co.* 45 Fed. Rep. 16; *Talley* v. *Curtain*, 4 C. C. A. 177 (54 Fed. Rep. 48); *Russell* v. *Clark's Ex'r*, 7 Cranch 87; *Oelrichs* v. *Spain*, 15 Wall. 228.

Sec. 382. Setting aside—Complaint. A complaint need not allege that the property was not exempt from exection. A complaint againt the administrator of a deceased fraudulent grantor must allege that the other assets of the estate were insufficient to pay all the intestate's debts. It is sufficient to allege that there was no property of said estate with which to pay the plaintiff's claim except by setting aside the conveyance and it need not allege that the grantor had no property from the making of the conveyance until his death. *State* v. *Parsons*, 147 Ind. 579 (47 N. E. Rep. 17; 62 Am. St. Rep. 430). Particular complaint held sufficient. *Conley* v. *Buck*, 100 Ga. 187 (28 S. E. Rep. 97.)

Sec. 383. Setting aside—Parties. Several creditors may join in an action to set aside a fraudulent conveyance. *Gamet* v. *Simmons*, 108 Ia. 168 (72 N. W. Rep. 444). The grantee in a fraudulent conveyance is a necessary party. *Terhune* v. *Sibbald*, 55 N. J. Eq. 236 (37 Atl. Rep. 454). In a suit to set aside as fraudulent a conveyance made to a partnership in payment of a debt due the firm, a deceased

partner's heirs are not necessary parties. *Folsom* v. *Detrick F. & C. Co.*, 85 Md. 52 (36 Atl. Rep. 446). In an action by creditors to establish their claims against the estate of a decedent and subject to their payment certain real estate alleged to have been fraudulently conveyed, the personal representative of the alleged debtor and those into whose hands any of the assets of the debtor necessary for the payment of his debts have improperly or fraudulently gone, as well as those who may have acquired or may claim to have acquired any liens upon such assets, are necessary parties. *Shepherd* v. *Green*, 48 S.C. 165 (26 S. E. Rep. 224). Where an action by the judgment creditors to set aside a conveyance as fraudulent does not ask for an accounting of rents and profits, it is not necessary to bring in as a party defendant, a receiver of the rents and profits of the real estate affected by the conveyance, appointed long after the conveyance was made and in an action to which the plaintiffs were not parties. *Daisy Roller Mills* v. *Ward*, 6 N. Dak. 317 (70 N. W. Rep. 271).

Sec. 384. Setting aside—Practice. An answer to a complaint charging the conveyance of property with intent to defraud creditors, which contains simply a general denial of all the allegations of the complaint not specifically omitted, is not sufficient to prevent judgment on the pleading, but where the answer sets up affirmatively that the deeds or conveyances attacked for fraud were made for the purpose of securing the defendant's debts which were then due, it is sufficient to prevent a judgment for the plaintiff on the pleadings. *National Wall-Paper Co.* v. *McPherson*, 19 Mont. 355 (48 Pac. Rep. 550). Where in an action to set aside a fraudulent conveyance intended as a mortgage, for fraud, the mortgagee seeks by cross petition to have the mortgage foreclosed, he must serve notice of his cross petition upon the mortgagor and prove its allegations where they are denied in the reply. *Cathcart* v. *Grieve*, 104 Ia. 330 (78 N. W. Rep. 835). Where, in an action to set aside a deed as fraudulent and to sell the real estate, the court decrees a conveyance fraudulent and void, it is error not to decree further and set aside the deed and provide for the sale of the property conveyed to pay the debt; but land not involved in the action cannot be

ordered sold in such decree. *Chrislip* v. *Teter*, 43 W. Va. 856 (27 S. E. Rep. 288). Where, in an action by a judgment creditor to declare a conveyance by his debtor fraudulent, the conveyance is adjudged to be a valid mortgage, the creditor is entitled to a judgment subjecting his debtor's equity of redemption in the property to his judgment. *Fenton* v. *Morgan*, 16 Wash. 80 (47 Pac. Rep. 214). A creditor's action to set aside a conveyance executed in fraud of creditors, will not be defeated by the fact that the debtor's claim of exemption and prior liens may absorb the whole property, unless it is made to appear beyond question that such will be the result. *Peterson* v. *Gittins*, Ia. (72 N. W. Rep. 662).

Sec. 385. Setting aside—Charging grantee with notice—Fraudulent intent as a question of fact. To charge a grantee with notice of the fraudulent intent of the grantor it is not necessary to prove positive knowledge on the part of such grantee. It is sufficient to prove that he had knowledge of facts and circumstances which were naturally and justly calculated to excite suspicion in the mind of a person of ordinary care and prudence and which would naturally prompt him to pause and inquire before consummating the transaction, and that such inquiry would have necessarily led to a discovery of facts from which the law imputes fraud to the grantor. *Ferguson* v. *Daugherty*, 94 Va. 808 (26 S. E. Rep. 822); *Gamet* v. *Simmons*, 108 Ia. 168 (72 N. W. Rep. 444). Construing Mills' Ann. Colo. Stat., § 2038 (Gen. Stat. 1883, § 1529), providing that fraudulent intent is a question of fact and not of law and that no conveyace is to be adjudged fraudulent solely upon the ground that it was not founded upon a valuable consideration, it is held that where the conveyance is in the nature of a gift, it is not necessary to show participation in the fraud by the grantee, and where the execution of such a conveyance by a failing debtor necessarily results in delaying his creditors, the conveyance is a legal fraud though no specific intent to defraud exists. *Wells* v. *Schuster-Hax Nat. Bank*, 23 Colo. 534 (48 Pac. Rep. 809). Construing Cal. Civ. Code, § 3442, which prior to 1895 provided that "the question of fraudulent intent is one of fact and not of law; nor can any

transfer or change be adjudged fraudulent solely on the ground that it was not made for a valuable consideration," but which was amended by Laws 1895, p. 154, by adding a provision " that any transfer or incumbrance of property made or given voluntarily or without a valuable consideration by a party while insolvent or in contemplation of insolvency shall be fraudulent and void as to existing creditors," it is held that the statute as amended does not apply to prior conveyances and that prior to this amendment a conveyance otherwise executed in good faith, cannot be set aside as a fraud upon creditors solely on the ground that it was not made for a valuable consideration, *Cook* v. *Cockins*, 117 Cal. 140 (48 Pac. Rep. 1025).

Sec. 386. Setting aside—Proof of fraud. Fraud must be proved; it cannot be presumed without proof, *Ensign* v. *Fisher*, 14 Utah 477 (47 Pac. Rep. 950); but it may be proved by circumstantial evidence. *Hazelwood* v. *Forrer*, 94 Va. 708 (27 S. E. Rep. 507). The fact that a debtor keeps the money realized from a conveyance of his property and his other property inaccessible to his creditors, is a strong circumstance showing a fraudulent intention in making the conveyance. *Cohen* v. *Parish*, 100 Ga. 335 (28 S. E. Rep. 122). Under N. Dak. Rev. Codes,§ 5052, if a creditor seeking to set aside a conveyance as fraudulent, as against himself, shows that the conveyance was made and received for the express purpose of defrauding another creditor, he thereby establishes its fraudulent character as against himself. *Daisy Roller Mills* v. *Ward*, 6 N. Dak. 317 (70 N. W. Rep. 271). The fraudlent character of a conveyance executed with an intent to defraud creditors is not changed by the fact that the grantee subsequently advances money to the grantor with the understanding that he is to be reimbursed out of the property. *Head* v. *Harding*, 166 Ill. 358 (46 N. E. Rep. 890). A deed which, when drawn, was intended by the grantor to operate to put his property out of the reach of his creditors, will not be set aside as fraudulent if it appears that, at the time of its delivery and acceptance by the grantee, the sole object of both the parties to the instrument was that it should be held by the grantee as security for the payment of a debt due from the

grantor to a third person. *Stewart* v. *Exchange Bank*, 55 N. J. Eq. 795 (38 Atl. Rep. 952). Particular evidence held insufficent to make a *prima facie* case of fraud. *Ensign* v. *Fisher*, 14 Utah 477 (47 Pac. Rep. 950). Particular evidence held sufficient to set aside a conveyance as a fraud upon creditors. *Ferguson* v. *Daugherty*, 94 Va. 308 (26 S. E. Rep. 822). Particular evidence held insufficent to show a deed to be fraudulent as to creditors. *Frank* v. *Stephenson*, Miss. (21 So. Rep. 778); *Wilkinson* v. *Buster*, 115 Ala. 578 (22 So. Rep. 34).

Sec. 387. Setting aside — Burden of proof — Evidence. The creditor assailing a conveyance as fraudulent has the burden of proof. *Coyne* v. *Sayre*, 54 N. J. Eq. 702 (36 Atl. Rep. 96). When it is made to appear that the debt due the plaintiff antedated the conveyance and that the grantee took his deed with knowledge of the debtor's insolvency, the burden of proof is on the grantee to show by clear and convincing evidence the valuable and adequate consideration passing from him for the land, in what it consists and how it was paid. *Martin* v. *Berry*, 116 Ala. 288 (22 So. Rep. 498). Evidence which merely excites suspicion that fraud may have existed is not sufficient; it must reasonably justify an inference of the actual existence of fraud. *Taylor* v. *Wands*, 55 N. J. Eq. 491 (37 Atl. Rep. 315; 62 Am. St. Rep. 818). Under Va. Code, § 3351, the plaintiff may call a party having an adverse interest, as a witness to prove the alleged fraud and he is entitled to the benefit of the facts given by his testimony. *Ferguson* v. *Dougherty*, 94 Va. 308 (26 S. E. Rep. 822). Where fraud in the sale or purchase of property is in issue, evidence of other frauds of like character committed by the same parties at or near the same time, is admissible. *Piedmont Bank* v. *Hatcher*, 94 Va. 229 (26 S. E. Rep. 505). A deed will not be set aside as fraudulent where the evidence shows only one incident in the whole transaction which is not consistent on its face with the theory of good faith. *Kleeb* v. *Frazer*, 15 Wash. 517 (47 Pac. Rep. 11). Where the intent of the grantor is in issue when his conveyance is attacked on account of fraud, his statements made prior to the transaction, and relating thereto, are admissible to establish his motive.

Thomas v. *McDaneld*, 102 Ia. 564 (71 N. W. Rep. 572). Where a deed from a husband to his wife is assailed by his creditors she may testify as to the payment of the consideration by herself. *Kelly* v. *William Sharp Saddlery Co.*, 99 Ga. 393 (27 S. E. Rep. 741). In such a case admissions of the fraud made by the husband when his wife was not present are held admissible. *Coburn* v. *Storer*, 67 N. H. 86 (36 Atl. Rep. 607). Where the husband conveys real estate to his wife through a third party by means of a sham sale, the husband's declarations as to the transaction and his intentions in regard to the property made while the title was held by the third party, are admissible in an action by his creditors to set aside the transaction as a fraud. All the transactions of both the husband and wife concerning her acquisition of the property, are admissible in evidence. *Poundstone* v. *Jones*, 182 Pa. St. 574 (38 Atl. Rep. 714). For case determining particular questions of evidence, see *Morgan* v. *Taylor*, Tenn. (42 S. W. Rep. 178).

Sec. 388. Badges of fraud—Withholding instrument from record. Mere relationship of the parties to the conveyance alone is not a badge of fraud which calls for an explanation. *Cathcart* v. *Grieve*, 104 Ia. 380 (73 N. W. Rep. 885). The fact that an absolute conveyance was in fact a mortgage, does not render it fraudulent as to the grantor's creditors where no fraud was intended and none of the creditors were in fact misled. *Brown* v. *Bradford*, 103 Ia. 378 (72 N. W. Rep. 648). The mere fact that a mortgage is not recorded at or near the time of its execution does not render it fraudulent. It only becomes so by virtue of some agreement or arrangement between the mortgagor and mortgagee which has for its purpose the protection of the mortgagor, in order that he may continue his business on a fictitious basis, and obtain credit which he could not otherwise receive. Such deceit requires the concurrence or connivance of both parties. The mere hope of the one or the neglect of the other will not amount to fraud. *In re Bloomfield Woolen Mills*, 101 Ia. 181 (70 N. W. Rep. 115). The principle of this case is supported by *Brown* v. *Bradford*, 103 Ia. 378 (72 N. W. Rep. 648); *Campbell* v. *Remaly*, 112 Mich. 214 (70 N. W. Rep.

482); *American Freehold Land & Mortgage Co.* v. *Maxwell*, 39 Fla. 489 (22 So. Rep. 751).

A deed cannot be set aside as a fraud upon creditors on account of the parties withholding it from record by agreement, unless it is shown that such agreement was made for the purpose of deceiving others or had that effect. *First Nat. Bank* v. *Rohrer*, 188 Mo. 369 (89 S. W. Rep. 1047.) Particular case in which the withholding of a mortgage from record given to secure advancements made to the mortgagor, was held void as to a creditor extending credit on the faith of the mortgaged property. *Collins* v. *Corwith*, 94 Wis. 514 (69 N. W. Rep. 849).

HOMESTEAD.

EPITOME OF CASES.

Sec. 389. Who may claim a homestead. A non-resident of the state of Tennessee cannot claim the benefit of the homestead statutes of that state. *Farris* v. *Sipes*, 99 Tenn. 298 (41 S. W. Rep. 443); *McClellan* v. *Carroll*, Tenn. (42 S. W. Rep. 185). In the second case cited it is held that the homestead rights of a resident of Tennessee who becomes a resident of another state, cannot be preserved by his wife remaining in the former state and residing on the lands. Under the statutes of Dakota territory, as they existed in 1888 (Dak. Comp. Laws, 1887, §§ 2449–2468), a single man who never had a wife or child, was not entitled to claim a homestead exemption. *McCanna* v. *Anderson*, 6 N. Dak. 482 (71 N. W. Rep. 769). A married woman living with her husband may claim a homestead under Ill. Rev. Stat., ch. 52, § 1. entitling "every householder having a family" to claim a homestead. *Zander* v. *Scott*, 165 Ill. 51 (46 N. E. Rep. 2). An abandoned wife may claim a homestead, *Watterson* v. *E. L. Bonner Co.*, 19 Mont. 554 (48 Pac. Rep. 1108; 61 Am. St. Rep. 527); but a married woman cannot claim a homestead in land as the "head of the family" while she has a husband who lives upon the same land, although in a separate house,

and they have not cohabited for several years and she supports the family. *Barry* v. *Western Assur. Co.*, 19 Mont. 571 (49 Pac. Rep. 148; 61 Am. St. Rep. 530). Construiug Okla. Stat. 1890, § 2860, which exempts a homestead to "the head of every family," it is held that a wife is not entitled to a homestead out of her own land, nor is the husband entitled to a homestead in the lands belonging to his wife. Exemption is to the husband as the head of the family and of the property of the husband. *McGinnis* v. *Wood*, 4 Okla. 499 (47 Pac. Rep. 492).

Sec. 390. In what lands a homestead may be claimed. There cannot be two homesteads in a single tract of land belonging to different persons at the same time. *Hay* v. *Whitney*, 59 Kan. 771 (51 Pac. Rep. 896). An undivided interest in lands accompanied by exclusive possession will support a homestead right. *Brokaw* v. *Ogle*, 170 Ill. 115 (48 N. E. Rep. 894). Where the occupancy of the life tenant is in the nature of a homestead claim, the remainderman cannot claim a homestead in the same lands. *Brokaw* v. *Ogle*, 170 Ill. 115 (48 N. E. Rep. 894). Citing, *Murchison* v. *Plyler*, 87 N. C. 79; *Merrifield* v. *Merrifield*, 82 Ky. 526; *Cornish* v. *Frees*, 74 Wis. 490 (43 N. W. Rep. 507). Applying the principle that whether the claimant's title to the land be good or bad is not a matter which concerns the creditor, it is held that a person can claim a homestead on public land of the United States. *Watterson* v. *E. L. Bonner Co.*, 19 Mont. 554 (48 Pac. Rep. 1108; 61 Am. St. Rep. 527). Citing, *Spencer* v. *Geissman*, 37 Cal. 96 (99 Am. Dec. 248). In Michigan it is held that a homestead right may be claimed in land held by a tenant in common if the whole does not exceed in quantity and value the homestead limit; but where the widow and children of a deceased tenant in common occupies the common estate as a home with the decedent's cotenant, the wife of one of the children living on the place has no homestead right therein, her husband not having any exclusive possession in any particular part of the land. *Hooper* v. *McAllister*, 115 Mich. 174 (73 N. W. Rep. 133). Following, *Tharp* v. *Allen*, 46 Mich. 389 (9 N. W. Rep. 443). In Tennessee it is held that neither the husband nor wife can

claim a homestead in land which is her separate property. *Adcock* v. *Mann*, Tenn. (88 S. W. Rep. 99). Particular contract of sale held not to give a vendee an interest in property to which a homestead right could attach. *Rentchler* v. *Lawton*, 118 Mich. 14 (71 N. W. Rep. 880).

Sec. 391. Lands acquired in exchange for property liable for debts. A homestead may be acquired in lands so as to exempt them from debts created before their acquisition but not then reduced to judgment, although such homestead was obtained by exchange for property liable for the payment of such debts. *Paxton* v. *Sutton*, 53 Neb. 81 (78 N.W. Rep. 221). The court say: "A few cases are opposed to the views we have expressed,—notably, *Pratt* v. *Burr*, 5 Biss. 86 (Fed. Cas. No. 11, 372). The reasoning of that case would, however, defeat the exemption as against any preexisting debt, and is based, as in other cases taking a similar view, on the injustice and apparent immorality of a claim of exemption under such circumstances. Such cases neglect the fundamental principle that the courts cannot set aside valid legislative acts, or ingraft amendments upon them, merely because the judges deem the legislation unwise or even unjust. In all cases of exemptions the creditor suffers because the legislature has deemed the importance of protecting the family in its home and sustenance to be greater than that of enforcing the payment of debts. The great weight of authority is, however, in accordance with the opinion we have indicated. In *Comstock* v. *Bechtel*, 63 Wis. 656 (24 N. W. Rep. 465), the question was squarely presented whether a conversion of nonexempt property into exempt, for the sole purpose of placing it beyond the reach of creditors, would subject the latter property to the payment of debts, existing at the time of the conversion; and the court held that it would not; that the property, from its character, remained exempt, and the only remedy of the creditor was by attacking the sale of nonexempt property. *Cipperley* v. *Rhodes*, 53 Ill. 346, was a case like the one before us, even to the fact of the conveyance of the homestead to the wife, and the homestead was held exempt because 'it was not a fraud on creditors to buy a homestead which would be beyond their reach.' So in *Jacoby* v. *Distil-*

ling Co., 41 Minn. 227 (43 N. W. Rep. 52), the debtor's right was in such case affirmed, because 'he is merely exercising a right which the law gives him and subject to which every one gives him credit.' Michigan holds to the same effect, the court saying: 'There may be a moral wrong in thus keeping property from creditors, but, if so, it is one which the statute, on the grounds of public policy, and to prevent distressing families, has sanctioned, in allowing exemption, and therefore is not legally a fraud.' *O'Donnell* v. *Segar*, 25 Mich. 367. And in California, after one decision indicating a contrary view, it is now settled that one may apply nonexempt property to the discharge of incumbrances on a homestead, and claim the whole homestead as exempt. *Randall* v. *Buffington*, 10 Cal. 498; *In re Henkle*, 2 Sawy. 305 (Fed. Cas. No. 6,362). The law is thus stated by Foster, J., in *Kelly* v. *Sparks*, 54 Fed. Rep. 70: 'It seems to be well settled, in principle and the preponderance of authority, that an insolvent debtor, knowing himself to be insolvent, may acquire a homestead for himself and family, and hold the same exempt from his creditors, although purchased with nonexempt assets, and that fraud cannot be imputed to such an act. * * * Credit is given the debtor in full view of this comprehensive exemption.' See, too, *Bank* v. *Glass*, 25 C. C. A. 151 (79 Fed. Rep. 706)."

Sec. 392. Occupancy and use necessary — Contiguous parcels. Land cannot be claimed as exempt from execution as a homestead under Utah Comp. Laws 1888, § 3429, subd. 11, where it is not being used as the residence of the debtor or his family, nor in any manner appurtenant to, or used in connection with their residence, nor selected by him for a homestead. *Gammet* v. *Storrs*, 15 Utah 336 (49 Pac. Rep. 642). In Kentucky a homestead may be claimed in lands purchased as such, against a debt subsequently created, although not occupied by the claimant until afterward. A residence on the lands claimed as a homestead by one having no other home with his wife and family, sufficiently shows that the claimant is a *bona fide* house holder with a family. *Crouch* v. *Meguiar-Harris Co.*, Ky. (42 S. W. Rep. 91). It is not necessary for one to reside upon lands in order for him

to claim a homestead therein, but he may claim a homestead in the lands adjoining those upon which he resides. *Redmon* v. *Citizens' Bank*, Ky. (39 S. W. Rep. 432). Where a husband and wife resided upon land belonging to her, and used it and a contiguous tract belonging to him as a homestead, upon his decease she may claim a homestead in the latter tract. *Buckler* v. *Brown*, Ky. (39 S. W. Rep. 509). In Alabama it is held that a building used as a store room cannot be claimed as a homestead, although the owner thereof may have resided therein in connection with his business. *Bell* v. *Anniston Hardware Co.*, 114 Ala. 341 (21 So. Rep. 414). Two tracts of land which corner with each other are contiguous and may be claimed as a homestead, where their combined area does not exceed the statutory limit. *Clements* v. *Crawford Co. Bank*, 64 Ark. 7 (40 S. W. Rep. 132; 62 Am. St. Rep. 149). See Ballards' Law of Real Prop., Vol. II, § 282. It is held that one asserting a right of homestead under Fla. Const. 1885, art. 10, § 1, is not entitled to claim as a part of his homestead a detached tract of land separated from the homestead by other parcels of land neither owned nor occupied by the owner of the homestead, though such other tract be used and cultivated as a part of the homestead and both tracts together do not exceed the constitutional limits as to quantity. *Brandies* v. *Perry*, 39 Fla. 172 (22 So. Rep. 268; 63 Am. St. Rep. 164).

Sec. 393. Amount of land claimed—Statutes construed. The outbuildings, fences and other improvements upon land claimed as a homestead, constitute part of the homestead, unless taken together they exceed the amount exempted to the homesteader. *Watterson* v. *E. L. Bonner Co.*, 19 Mont. 554 (48 Pac. Rep. 1108; 61 Am. St. Rep. 527). Citing, *Greeley* v. *Scott*, 2 Woods 657 (Fed. Cas. 5,746); *Conklin* v. *Foster*, 57 Ill. 104. Construing and applying Cal. Civ. Code, § 1237, providing that "a homestead consists of the dwelling house in which the claimant resides and the land on which the same is situated," it is held that a claim of homestead will not include an inclosed adjacent lot upon which there is a house not used by him but rented to others. *In re Ligget*, 117 Cal. 352 (49 Pac. Rep. 211; 59 Am. St. Rep.

190). A homestead claimant, owning more than 160 acres of land, who attempts under Kan. Gen. Stat. 1889, ch. 28, § 2, to select as his exemption 160 acres upon which he does not reside, but a portion of which is connected by contiguous tracts with the one upon which he does reside, is not to be denied an exemption in such portion as is thus connected, merely because he omits to claim it in connection with the tract upon which he lives. *Peak* v. *Lenora State Bank*, 58 Kan. 485 (49 Pac. Rep. 618). In Arizona every head of a family whose family resides in the territory may claim as a homestead exemption real property in one compact body, not exceeding in value $2500. Laws 1899, p. 48. Idaho Rev. Stat. (Civ. Code, tit. VII, ch. 1) has been amended by adding § 3060 defining homestead and prescribing what it shall include. Laws 1899, p. 293.

Sec. 394. Amount of property claimed in city or town—Statutes construed. Under the statute of Illinois, a homestead exemption claimed in a town lot is not limited to the portion of the lot covered by the dwelling but extends to the whole lot, and for the purpose of locating it a court will take judicial notice of the subdivision of town and city property into separate blocks and lots. The homestead may include more than one lot where they are all occupied as one lot of land constituting a single residence, but it will not be extended in this manner to include lots which have residences that are leased and occupied by others. *Sever* v. *Lyon*, 170 Ill. 395 (48 N. E. Rep. 926). The mere laying out of an unincorporated town by the filing of a plat which was not accepted, does not create a town within the meaning of Sand. & H. Ark. Dig., § 3712, limiting the area of a homestead "in any city, town, or village," to one acre. *Clements* v. *Crawford Co. Bank*, 64 Ark. 7 (40 S. W. Rep. 132; 62 Am. St. Rep. 149). The term "lot" is employed in Neb. Comp. Stat. ch. 36, § 1, exempting homesteads, to heads of families, in its popular sense, and denotes a parcel of land within a city or village as surveyed and platted. *Norfolk State Bank* v. *Schwenk*, 51 Neb. 146 (70 N. W. Rep. 970). Construing and applying Minn. Gen. Stat. 1894, § 5521, it is held that whether or not one may claim as a homestead an unplatted

tract of land within the laid out and platted portion of a city having over 5,000 inhabitants, which is larger than a "lot," depends on whether it is in the rural or urban portion of the city. *National Bank of the Republic* v. *Banholzer*, 60 Minn. 24 (71 N. W. Rep. 919). For further construction of this statute, see *Ford* v. *Clement*, 68 Minn. 484 (71 N. W. Rep. 672).

Sec. 395. Selection, allotment and declaration of homestead. In Alabama it is held that a claim of exemption of land from a justice's execution as a homestead is waived and lost, unless it be interposed before an order for the sale of the land is made by the circuit court. *Lackland* v. *Rogers*, 118 Ala. 529 (21 So. Rep. 841). Cal. Code Civ. Proc., § 1465, construed and applied—procedure to set apart homestead. *In re Ligget*, 117 Cal. 852 (49 Pac. Rep. 211; 59 Am. St. Rep. 190). Ga. Code, § 2040, applied—selection of homestead out of larger tract—making of survey and plat. *Branch* v. *Ford*, 99 Ga. 761 (26 S. E. Rep. 759). Idaho Rev. Stat., § 3071, applied—sufficiency of declaration of homestead. *Wilcox* v. *Deere*, Idaho (51 Pac. Rep. 98). N. M. Laws 1887, pp. 75, 76, construed and applied—procedure for selecting homestead. *United States* v. *Lesnet*, N. M. (50 Pac. Rep. 821). Wash. Laws 1877, p. 72, § 346; Act March 18, 1895; Hill's Ann. Code, Vol. 2, § 481, construed and applied —selection of homestead. *Anderson* v. *Stadlmann*, 17 Wash. 433 (49 Pac. Rep. 1070). Wash. Code Proc., § 481, applied —time given for selection of homestead. *Wiss* v. *Stewart*, 16 Wash. 376 (47 Pac. Rep. 736). How. Ann. Mich. Stat., §§ 7723, 7724—declaration and selection of homestead by execution defendant—amended, Laws 1899, p. 338.

Sec. 396. Exemption of homestead from debts. A judgment against the owner of a homestead is not a lien on it where its value does not equal the amount allowed as exempt. *Brokaw* v. *Ogle*, 170 Ill. 115 (48 N. E. Rep. 894). Construing S. Dak. Comp. Laws, §§ 2452, 5126, 5127, Laws 1890, ch. 86, it is held that a homestead is not subject to a mechanic's lien. *Fallihee* v. *Wittmayer*, 9 S. Dak. 479 (70 N. W. Rep. 642). It is not subject to the debts of the deceased owner

unless they were contracted prior to its acquisition. *In re Gardner's Estate*, 103 Ia. 738 (72 N. W. Rep. 652). The case of *Higgins* v. *Bordages*, 88 Tex. 458 (reported in full in Ballards' Law of Real Property, Vol, IV. §§ 342–346), which holds a homestead exempt from sale to pay municipal assessments, is expressly reaffirmed in *Storrie* v. *Cortes*, 90 Tex. 283 (38 S. W. Rep. 154; 35 L. R. A. 666). The right to a homestead exemption to the extent of $1,000 given to a household debtor having a family, in the territory of New Mexico, by 16 U. S. Stat., 278, may be asserted by such a person against the United States. *United States* v. *Lesnet*, N. M. (50 Pac. Rep. 321). The fact that the owner of a homestead has mortgaged it to secure a loan, does not make it subject to sale on execution for his debts. *Wiss* v. *Stewart*, 16 Wash. 376 (47 Pac. Rep. 736). The surplus arising from an execution sale of a homestead to satisfy a judgment which was a lien upon it belongs to the homestead claimant as against one holding a judgment which was not a lien on the homestead. *Simpson* v. *Biffle*, 63 Ark. 289 (38 S. W. Rep. 845). Wis. Rev. Stat., § 2983, exempting the proceeds of the sale of a homestead from liability for the debts of the owner, "while held with the intention to procure another homestead therewith," applies to a surplus remaining after a foreclosure sale of the homestead and other lands, had under a mortgage covering both, where the value of the property not included in the homestead was less than the amount of the mortgage debt. *Clancey* v. *Alme*, 98 Wis. 229 (73 N. W. Rep. 1014). Construing Cal. Code, § 1241, providing that a homestead is subject to execution "on debts secured by mortgages upon the premises executed and recorded before the declaration of homestead was filed for record," it is held that a wife's claim of homestead made after the recording of a mortgage executed by her husband, which was not entitled to record on account of having a void certificate of acknowledgment, cannot be sold under such mortgage, although she had notice of it at the time she filed her declaration of homestead; that where the statutes prescribes the debts for which a homestead may be sold, it cannot be sold for any other debts; and as this statute does not include an equitable lien for the price of land, such lien is

inferior to the claim of homestead. *Lee* v. *Murphy*, 119 Cal. 364 (51 Pac. Rep. 549). S. C. Rev. Stat., § 2135, applied—liability of sheriff for selling land in violation of homestead law. *Corry* v. *Tate*, 48 S. C. 548 (26 S. E. Rep. 794).

Sec. 397. Debts for which a homestead is liable. A claim of a homestead is subject to liens existing thereon at the inception of the claim. *Bell* v. *Anniston Hardware Co.*, 114 Ala. 341 (21 So. Rep. 414). A homestead claimant cannot defeat a mortgage thereon given to secure a loan, to the extent the loan was used to discharge a prior vendor's lien existing against the homestead. *Dixon* v. *National Loan & Inv. Co.*, Tex. Civ. App. (40 S. W. Rep. 541). Particular case in which a wife was held not entitled to claim a homestead as against the claim of her husband's vendor for advancements made to him to aid in the erection of buildings on the land. *Converse* v. *Barnard*, 114 Mich. 622 (72 N. W. Rep. 611). Under Ala. Code 1886, § 2509, the lien for the purchase money is superior to a homestead claim. *Stanley* v. *Johnson*, 118 Ala. 344 (21 So. Rep. 828). Under Idaho Rev. Stat., § 3039, a mortgage lien cannot be defeated by a declaration of homestead made after the lien attaches. *Law* v. *Spence*, Idaho (48 Pac. Rep. 282). Where, at the time of the docketing of a first judgment it becomes a paramount lien on property of the debtor largely in excess of the limit of homestead exemption, he cannot assert a homestead right in the proceeds of the property as against such judgment, because subsequent liens in favor of which he waived such right will exhaust the property below the limit of the exemption. *Strayer* v. *Long's Ex'r*, 93 Va. 695 (26 S. E. Rep. 409).

Sec. 398. Abandonment, loss or waiver of homestead. The right to claim an exemption of lands as a homestead is not lost by their conveyance with other lands in fraud of the claimant's creditors. Upon the setting aside of such a conveyance by creditors the homestead exemption may be claimed by the grantor and he need not make such claim until after the decision setting aside the conveyance. *First Nat. Bank* v. *Kennedy*, 113 Ala. 279 (21 So. Rep. 387), expressly

following the case of *Kennedy* v. *First Nat. Bank*, 107 Ala. 170 (18 So. Rep. 396; 36 L. R. A. 308), epitomized in Ballards' Law Real Property, Vol. IV, § 336. The case first cited above contains an exhaustive dissenting opinion by Coleman, J., discussing the question as to whether the claim of homestead in such a case should be made before or after the decision setting aside the conveyance. A subsequent declaration of abandonment of a homestead by a husband and wife, gives no validity to a void mortgage of the homestead. *American Sav. & L. Ass'n* v. *Burchardt*, 19 Mont. 328 (48 Pac. Rep. 891; 61 Am. St. Rep. 507). Citing, *Gleason* v. *Spray*, 81 Cal. 217 (22 Pac. Rep. 551). A homestead is not abandoned by a temporary removal with an intention of returning to it. *Hitchcock* v. *Misner*, 111 Mich. 180 (69 N. W. Rep. 226). Temporary absence from, or non-occupancy of, a part of a homestead, where entire dominion over the same is not surrendered, does not operate as a waiver or abandonment of the homestead right. *Pitney* v. *Eldridge*, 58 Kan. 215 (48 Pac. Rep. 854). In the case of *Murphy* v. *Farquhar*, 39 Fla. 350 (22 So. Rep. 681), the supreme court of Florida say: "While the law is well settled that a temporary absence in search of health or pleasure, or on another place for purposes of business, will not deprive the homestead claimant of his right, unless it be apparent that there was a design of permanent abandonment, *Tumlinson* v. *Swinney*, 22 Ark. 400 (76 Am. Dec. 432); *Walters* v. *People*, 18 Ill. 194 (65 Am. Dec. 730); notes and cases cited in *Taylor* v. *Hargous*, 4 Cal. 268 (60 Am. Dec. 607, *et seq*); *Fyffe* v. *Boers*, 18 Ia. 4 (85 Am. Dec. 577); *Franklin* v. *Coffee*, 18 Tex. 413 (70 Am. Dec. 292); *Kenley* v. *Hudleson*, 99 Ill. 493 (39 Am. Rep. 31); yet it is equally well settled that a permanent abandonment of the homestead as a *bona fide* home and place of permanent abode strips it of its homestead character, and deprives the claimant of the right to exempt it from sale for his debts, *Bank* v. *Wheeler's Adm'r*, 20 Kan. 625; *Ross* v. *Hellyer*, 26 Fed. Rep. 413; *Cotton* v. *Hamil*, 58 Ia. 594 (12 N. W. Rep. 607); *Titman* v. *Moore*, 43 Ill. 169; *Carter* v. *Goodman*, 11 Bush 228; *Lehman* v. *Bryan*, 67 Ala. 558; *Cabeen* v. *Mulligan*, 37 Ill. 230 (87 Am. Dec. 247); *Smith* v. *Bunn*, 75 Mo. 559; *Jarvais* v. *Moe*, 38 Wis. 440." The removal of a husband

to another state to live with his daughter does not operate to abandon his homestead where his wife continues to occupy the same, it not being shown that he acquired an independent homestead elsewhere. *Gadsby* v. *Monroe*, 115 Mich. 282 (78 N. W. Rep. 367). Where one leased his farm homestead and removed to a city intending to return to the farm at the expiration of the lease if he did not sell it, subsequently entered into a contract of sale, receiving part of the purchase price and thereafter claimed a voting residence in the city, it is held that he abandoned his homestead. *Conway* v. *Nichols*, Ia. (71 N. W. Rep. 183). The fact that a homestead claimant votes in a precinct other than that of his homestead is not conclusive evidence of his intention to abandon it. *Robinson* v. *Charleton*, 104 Ia. 296 (73 N. W. Rep. 616). Particular evidence held to show an abandonment of a homestead. *Clark* v. *Dewey*, 71 Minn. 108 (73 N. W. Rep. 639); *Boehm* v. *Beutler*, 16 Tex. Civ. App. 380 (41 S. W. Rep. 658). Particular evidence held insufficient to show an abandonment of a homestead in a farm by removal of the owner therefrom to a town to reside. *Mills* v. *Mills*, 141 Mo. 195 (42 S. W. Rep. 799).

The leasing of a part of a homestead consisting of farm lands, for a period of years, for the purpose of establishing a nursery thereon, does not constitute an abandonment. *Pitney* v. *Eldridge*, 58 Kan. 215 (48 Pac. Rep. 854). A widow having a homestead right in lands does not abandon her claim of homestead by leasing the premises and using the income for her support while living with one of her children. *Brokaw* v. *Ogle*, 170 Ill. 115 (48 N. E. Rep. 894). A husband and wife may abandon their homestead right in lands by placing their son-in-law in possession under a parol contract by which he is to have the lands upon the performance of certain conditions. *Allbright* v. *Hannah*, 103 Ia. 98 (72 N. W. Rep. 421). A wife who occupies with her husband, land held by him under an executory contract of purchase in which they claim a homestead right, is held to have abandoned her homestead rights therein, where he afterwards surrenders the contract and they occupy the premises under a lease from a subsequent vendee of his vendor. *Anderson* v. *Cosman*, 103 Ia. 266 (72 N. W. Rep. 523; 64 Am. St. Rep. 177). Construing Ky. Stat.

1894, § 1707, providing that "the homestead shall be for the use of the widow so long as she occupies the same, and the unmarried infant children of the husband shall be entitled to the joint occupancy with her until the youngest unmarried child arrives at full age, but the termination of the widow's occupancy shall not affect the right of the children," it is held that a conveyance of land held by a widow as a homestead under this statute, does not pass any title to the grantee, but operates as an abandonment of her homestead right. *Freeman* v. *Mills*, Ky. (39 S. W. Rep. 826). Where the homestead character of land has been established, one who seeks to sustain an execution sale thereof, on the ground that the homestead had been abandoned before the sale has the burden of proof; and if the debt for which the sale was made was contracted while the land was occupied as a homestead, more satisfactory evidence is required than if credit had been extended on the faith that it was subject to the payment of debts. *Robinson* v. *Charleton*, 104 Ia. 296 (73 N. W. Rep. 616). Under Ia. Code, § 2000, a homestead claimant upon deciding to sell his homestead and buy another home, is entitled to a reasonable time in which to accomplish such object, and until such time has elapsed he will not be held to have abandoned his homestead. What will be a reasonable time must depend upon the facts of each particular case. *Robinson* v. *Charleton*, 104 Ia. 296 (73 N. W. Rep. 616).

In Georgia it is held that until a homestead has been selected and set apart to a debtor, he has authority to waive the benefit of the homestead law. *Branch* v. *Ford*, 99 Ga. 761 (26 S. E. Rep. 759). In Illinois it is held that the right to claim of a homestead, as exempt from execution sale, is not waived merely because it is not made before the sale. *Zander* v. *Scott*, 165 Ill. 51 (46 N. E. Rep. 2). A recital in a mortgage that the mortgagors "waive all right to said land under the exemption laws of this state," operates as a relinquishment of any homestead right. *Head* v. *Auberry*, Ky. (38 S. W. Rep. 863). A widow's right to a homestead in her husband's lands is not barred by an execution sale under a judgment to which they are subject, where no deed was ever issued thereon to the purchaser; nor is her right affected by a conveyance by her husband to the pur-

chaser, or his grantee in which she did not join. *Gross* v. *Washington*, Tenn. (38 S. W. Rep. 442). The mere fact that the owner of a rural homestead plats it, or any part thereof, into lots, without dedicating the streets shown on the plat to the public, does not affect his homestead rights in any part thereof. Nor does the sale of a part of such lots affect such rights in any part of the original tract remaining unsold providing the contiguity of what remains is preserved. *Phelps* v. *Northern Trust Co.*, 70 Minn. 546 (78 N. W. Rep. 842).

Sec. 399. Conveyance and incumbrance of homestead. A wife's subsequent declaration of a homestead in community property is not affected by a previous recorded mortgage executed by the husband alone which misdescribes the land. *Adams* v. *Baker*, Nev. (51 Pac. Rep. 252). A wife executing a mortgage covering her homestead, cannot have it set aside on account of her having been induced to sign it in ignorance of its contents, where it appears that the mortgagee acted in good faith and the officer taking her acknowledgment either read the mortgage to her, or asked her if she knew what it contained and she answered that she did. *German Bank* v. *Muth*, 96 Wis. 342 (71 N. W. Rep. 361). While the lands are occupied as a homestead, the husband's creditors cannot assail the validity of a conveyance of them by deed to his wife. *Murphy* v. *Farquhar*, 39 Fla. 350 (22 So. Rep. 681). Citing, *Green* v. *Farrar*, 58 Ia. 426 (5 N. W. Rep. 557); *Kruger* v. *Le Blanc*, 75 Mich. 424 (42 N. W. Rep. 858); *Burkett* v. *Burkett*, 78 Cal. 310 (20 Pac. Rep. 715; 12 Am. St. Rep. 58; 3 L. R. A. 781); *McMahon* v. *Speilman*, 15 Neb. 658 (20 N. W. Rep. 10); *McHugh* v. *Smiley*, 17 Neb. 626 (24 N. W. Rep. 277).

Sec. 400. Conveyance and incumbrance of homestead —Necessity of joint conveyance of husband and wife. The mortgage of a homestead, void because not properly executed by a husband and wife, does not become valid by a subsequent declaration of abandonment of the homestead by the husband and wife. *American Sav. & L. Ass'n* v. *Burchardt*, 19 Mont. 323 (48 Pac. Rep. 391; 61 Am. St. Rep. 507). Citing.

Gleason v. *Spray*, 81 Cal. 217 (22 Pac. Rep. 551; 15 Am. St. Rep. 47). Under Ala. Const. art., 10, § 2; Code, §§ 2508, 2515, it is held that a mortgage by the husband alone is void as to lands embraced in it which are afterwards selected as a homestead. *Marks* v. *Wilson*, 115 Ala. 561 (22 So. Rep. 134). But a recent statute of this state provides that where a married woman has been legally declared insane, her husband may convey the homestead as though he were single, the deed stating that he is a married man and that his wife is insane, and having attached to it a copy of the judgment of the court establishing her insanity. Laws 1899, p. 89. Ark. Laws 1899, p. 107, validates defective conveyances of a homestead executed since April 13, 1893; but this statute does not validate any conveyance not signed by the wife or instruments in litigation at the time of its passage. Construing and applying Kan. Const., art. 15, § 9, Gen. Stat. 1889, par. 2996, providing that a homestead "shall not be alienated without the joint consent of husband and wife when that relation exists," it is held that where the wife's signature to a mortgage of the homestead is procured by duress the defense of duress may be made against its foreclosure, although it was given to secure the payment of a negotiable promissory note which had been transferred to an innocent holder before maturity. *Berry* v. *Berry*, 57 Kan. 691 (47 Pac. Rep. 837; 57 Am. St. Rep. 351). Citing, *Bank* v. *Bryan*, 62 Ia. 42 (17 N. W. Rep. 165). Applying Mich. Const. Art. 16, § 2, How. Ann. Stat., § 7722, providing that a conveyance of a homestad shall not be valid without the signature of the wife, it is held that a husband's conveyance of a homestead without his wife's signature is invalid, although a life estate in the homestead is reserved to her, *Gadsby* v. *Monroe*, 125 Mich. 282 (73 N. W. Rep. 367); but a life lease of a homestead, in the execution of which the wife joins by signing, is valid, although she is not named in the granting part. *Barrett* v. *Cox*, 112 Mich. 220 (70 N. W. Rep. 446). Construing and applying Mont. Comp. Stat. 1887, div. 1, § 323, which provides that a "mortgage or other alienation of such homestead by the owner thereof, if a married man, shall be void unless the wife join in the execution of the conveyance thereof," it is held that although the wife signs the mortgage of the homestead, it is

void if her acknowledgment is substantially defective. *Ameri Sav. & L. Ass'n* v. *Burchardt*, 19 Mont. 328 (48 Pac. Rep. 891; 61 Am. St. Rep. 507). Citing, *Bank* v. *Schmidt*, 6 Mont. 610 (13 Pac. Rep. 382). Neb. Comp. Stat. ch. 36, § 4, requiring a conveyance or incumbrance of a homestead to be signed and acknowledged by both husband and wife, applies, although they are not living together at the time of the execution of the instrument *France* v. *Bell*, 52 Neb. 57 (71 N. W. Rep. 984). Construing this statute with section 8 of the same chapter, which subjects a homestead to execution or forced sale "on debts secured by mechanics',laborers' or vendors' liens on the premises." it is held that a mortgage given by a wife at the time of the purchase of real estate, to secure the unpaid purchase money is valid security though not signed by the husband, though the property was purchased for, and occupied as, the family homestead. *Prout* v. *Burke*, 51 Neb. 24 (70 N. W. Rep. 512). Citing, Thomp. Homest. & Exemp., §§ 333, 343, 363; Wap. Homest. 352; *Christy Dyer*, 14 Ia. 438 (81 Am. Dec. 498); *Burnap* v. *Cook*, 16 Ia. 149 (85 Am. Dec. 507); *Pratt* v. *Bank*, 12 Kan. 570; *Kimble* v. *Esworthy*, 6 Ill. App. 517; *Andrews* v. *Alcorn*,13 Kan. 351; *Greeno* v. *Barnard*, 18 Kan. 518; *Amphlett* v. *Hibbard*, 29 Mich. 298; *Roy* v. *Clarke*, 75 Tex. 28 (12 S. W. Rep. 845); 1 Jones, Mortg., § 468. Under Tenn. Const.,art. 11, § 11; Mill & V. Tenn. Code, § 2939, the right of homestead can be conveyed only by joint deed of husband and wife when that relation exists. *Cox* v. *Keathley*, 99 Tenn. 522 (42 S.W.Rep. 437). Where a husband alone conveys a part of land claimed as a homestead and the remainder is worth less than the statutory amount allowed for a homestead, the wife may recover a homestead in the land conveyed, though the husband still owns other land worth more than the statutory homestead. *Cottrell* v. *Rogers*, 99 Tenn. 488 (42 S. W. Rep. 445). Under Hill's Ann. Wash. Code, Vol. 2, § 488, a mortgage of the homestead is not valid against the wife unless she joins therein. *Anderson* v. *Stadlmann*, 17 Wash. 433 (49 Pac. Rep. 1070).

Sec. 401. Rights of surviving husband, wife or children. The law in force at the time of a husband's death,

governs in determining the homestead rights of his widow and children. *Mills* v. *Mills*, 141 Mo. 195 (42 S. W. Rep. 709). Cal. Code Civ. Proc., § 1465; Civ. Code, § 1402, construed and applied—allotment of probate homestead—rights of minor child—community property. *In re Still's Estate*, 117 Cal. 509 (49 Pac. Rep. 468). Under Cal. Civ. Code, § 1265, a surviving childless husband may claim a homestead exemption in community property to the amount of $5,000 as against a debt contracted during the existence of the community and after the selection of the homestead. *Robinson* v. *Dougherty*, 118 Cal. 299 (50 Pac. Rep. 649). As to the relative rights of an administrator, widow and heirs of a decedent in his homestead lands, under the law of Florida, see *Hedick* v. *Hedick*, 38 Fla. 252 (21 So. Rep. 101). The rights of surviving widow and children in a homestead, given by Ill. Rev. Stat. ch. 52, §§ 2, 4, may be waived by the widow's consenting to a sale of the whole estate made for the payment of debts, under ch. 8, § 100. *Hayack* v. *Will*, 169 Ill. 145 (48 N. E. Rep. 292.) Under this statute a householder's exemption continues after his death for the benefit of his widow so long as she continues to occupy the homestead, and of her children, until the youngest child becomes twenty-one years of age. Applying this statute, it is held that the widow does not abandon the homestead by leasing the same and using the income to support herself during her last sickness while she is living at the residence of her daughter; that while the widow's right of homestead continues, one who has an estate in remainder in the land cannot claim it exempt as his homestead, as two homesteads cannot be claimed in the same land at one and the same time. *Brokaw* v. *Ogle*, 170 Ill. 115 (48 N. E. Rep. 894). In Illinois the widow's right of homestead is confined to the statutory limit of $1,000, and although statutory partition of property largely exceeding this amount in value and in which such a homestead right exists cannot be had without her consent, equity may decree a sale and division for the purpose of separating her homestead interest where the property cannot be divided. *Wilson* v. *Illinois Trust & Sav. Bank*, 166 Ill. 9 (46 N. E. Rep. 740). Ia. Code, §§, 2007, 2008, 2440, 2444, construed and applied—homestead rights of surviving wife—taking homestead in lieu of dower. *Peebles*

v. *Bunting*, 103 Ia. 489 (73 N. W. Rep. 882). For the discussion of the rights of a widow and children to a homestead exemption in the property of a decedent under the statutes of South Carolina, see *In re Worley's Estate*, 49 S. C. 41 (26 S E. Rep. 949).

HUSBAND AND WIFE.

EPITOME OF CASES.

Sec. 402. Antenuptial contracts and marriage settlements. Antenuptial contracts may be specifically enforced. *Thompson* v. *Tucker-Osborn*, 111 Mich. 470 (69 N. W. Rep. 780). See opinion for particular contract held sufficiently definite. The failure of an antenuptial agreement to contain a schedule of the property affected by it, as required by Mass. Gen. Stat., ch. 108, § 28, and the failure to record it as required by statute, 1867, ch. 248, does not affect its validity where the rights of creditors are not involved. *Cook* v. *Adams*, 169 Mass. 186 (47 N. E. Rep. 605). Where, in pursuance of an antenuptial contract, a man and woman have the marriage ceremony performed, he conveys land to her and they live together as husband and wife for more than five years, such a deed cannot be set aside for want of consideration because the wife's former husband who deserted her several years before, was alive during such supposed marriage, the parties to the deed, with full knowledge of all the facts, erroneously supposing him to be dead. *Ogden* v. *McHugh*, 167 Mass. 276 (45 N. E. Rep. 731). Where the provision made for an espoused wife is unreasonably small in proportion to the estate of the intended husband, that fact alone will raise a presumption of a fraudulent concealment of the husband's estate and invalidate the agreement at the instance of the wife, unless it be shown by the husband or those claiming the benefit of his agreement that she executed it with knowledge of the extent and value of his property. *Hessick* v. *Hessick*, 169 Ill. 486 (48 N. E. Rep. 712).

Where there is no proof of a fraudulent intent on his part a husband's antenuptial conveyance in consideration of mar-

riage cannot be held void as to his creditors. *Clark* v. *McMahon*, 170 Mass. 91 (48 N. E. Rep. 939). Where a deed of settlement by a man to his intended wife, granted her land for life "with full power of disposing of the same, his permission in writing being first obtained," it is held that a proper deed by the wife and husband conveys a good title to the purchaser notwithstanding a provision in the original deed that in case of the death of the wife before the husband the land shall revert to him. *Wright* v. *Westbrook*, 121 N. C. 155 (28 S. E. Rep. 298). Where a husband negotiates the purchase of lands, and procures the title to be placed in his wife's name and mortgages his own and other property, with that bought for her, to pay for the latter, and actually gives her the money raised on the mortgage, it is a complete gift to the wife, and casts upon the husband or his heirs, who dispute it, the burden of proving an obligation on her part to pay back the money, or some agreement on her part that the whole debt would be charged primarily on her property, leaving the husband's liable only for the deficiency. The relation of husband and wife, and his conduct in so dealing with the property purchased, raise a presumption that a gift or settlement is intended; and, while this presumption may be rebutted by proof, the burden is upon the party who disputes the gift. *Moran* v. *Neville*, 56 N. J. Eq. 326 (38 Atl. Rep. 851).

Sec. 403. Deeds of separation. A provision in a deed of separation as to a division of property is not void because it cannot be fully executed at the time of the agreement. *Stebbins* v. *Morris*, 19 Mont. 115 (47 Pac. Rep. 642). In this case the court follows the established common law doctrine upholding the validity of agreements between husband and wife for separation, in support of which they cite the following authorities: *Bettle* v. *Wilson*, 14 Ohio 257; *Carson* v. *Murray*, 3 Paige 500; *St. John* v. *St. John*, 11 Ves. p. 526; *Westmeath* v. *Westmeath*, Jac. 126; *Walker* v. *Walker*, 9 Wall. 750; *Garbut* v. *Bowling*, 81 Mo. 214; *Randall* v. *Randall*, 37 Mich. 563; *Blaker* v. *Cooper*, 7 Serg. & R. 502; *Wells* v. *Stout*, 9 Cal. 480; *Clark* v. *Fosdick*, 118 N. Y. 7 (22 N. E. Rep. 1111; 16 Am. St. Rep. 733; 6 L. R. A. 132); *Rains* v. *Wheeler*, 76 Tex. 390 (13 S. W. Rep. 324).

But to the citation of these authorities the court adds: "We are compelled to accept the general doctrine of these cases. But we are of the opinion that it is clearly subject to these limitations. An agreement for a separation which is to take place in the future is void as against public policy. So, too, after such an agreement is entered into, its terms must be immediately complied with on peril of nullity. And at the time of the making of such an agreement the relations between the husband and wife must be of such a character as to render the separation a matter of reasonable necessity for the health or happiness of the one or the other. There must be a moving cause for it in addition to the mere mutual volition of the parties. If it is the outcome of mutual caprice only, or a reckless disregard of the obliteration of the marriage tie, then the courts will not enforce it. In almost all the cases that we have investigated, either from the recitals in the agreement for the separation itself or from extrinsic evidence offered in connection therewith, the court has had before it an unhappy condition of marital relations as a moving cause for the contract. Judges have carefully discriminated between agreements for separation, outgrowths of domestic sorrow, entered into for the purpose of avoiding public scandal and notoriety, and those which have resulted from a wanton or reckless disregard of one of the highest obligations of life,—the duty which the husband and wife mutually owe to each other and to the public at large. In this view of the law, an agreement for separation of the latter kind would be a mere usurpation of the power conferred upon the courts alone to adjust marital dissensions in decrees of divorce."

A stipulation in a deed of separation, fixing the property rights of husband and wife, otherwise valid, are not affected by the fact that the portion of the contract by which they agree to live separately is void, as against public policy. *Luttrell* v. *Boggs*, 168 Ill. 861 (48 N. E. Rep. 171). A proviso in a contract of separation between a husband and wife, which assumes to equally divide all their property, that each released the other "from all obligations and liabilities for the future acts and debts of each other," does not constitute a release by either of the right to succeed to the estate of the other. *In re Jones' Estate*, 118 Cal. 499 (50 Pac. Rep. 766;

62 Am. St. Rep. 251). Construing a contract of separation, whereby the husband conveyed to his wife certain real estate and paid her a sum of money, which stipulated that "each party releases any and all claim, right, title or interest, either vested or contingent, either to or in property present or future acquired belonging to the other," it is held that the effect of the language was to give to the husband the full dominion of his own property with power to dispose of it by will or otherwise, without the assent of the wife, during her life, but did not affect her right to inherit from him as his widow, property of which he died seised. *Smith* v. *Smith*, 57 O. St. 27 (48 N. E. Rep. 28). But in Illinois it is held that a stipulation in a deed of separation by which each party releases to the other "all interest, right and title to any and all real estate," owned by the other at the time of the marriage operates to defeat the husband's right to claim dower. *Luttrell* v. *Boggs*, 168 Ill. 361 (48 N. E. Rep. 171).

Sec. 404. Contracts between husband and wife—Validity and construction. Forbearance to bring a well-founded suit for divorce is a sufficient legal consideration for a contract between husband and wife. *Polson* v. *Stewart*, 167 Mass. 211 (45 N. E. Rep. 737; 36 L. R. A. 771). Construing Ia. Code 1873, § 2203, providing that "when property is owned by either the husband or wife the other has no interest therein which can be the subject of contract between them," it is held that the statute renders void an agreement by a husband with his wife to pay her a certain sum in consideration of her joining with him in a conveyance of his lands. *Miller* v. *Miller*, 104 Ia. 186 (73 N. W. Rep. 484). Under this statute the giving by the husband to the wife of one-half the proceeds of a sale of land for her dower interest therein is without consideration. *Garner* v. *Fry*, 104 Ia. 515 (73 N. W. Rep. 1079). A contract between husband and wife, free from fraud or undue influence on his part, whereby she releases her right to inherit property of the husband if she survives him, is valid. *Leach* v. *Kains*, 149 Ind. 152 (48 N. E. Rep. 858). Citing, *Dakin* v. *Dakin*, 97 Mich. 284 (56 N. W. Rep. 562); *Chittock* v. *Chittock*, 101 Mich. 367 (59 N. W. Rep. 655); 1 Beach, Mod. Cont., § 475; 2 Beach, Mod. Cont., § 954; *Thomas* v.

Brown, 10 O. St. 247; *Miller's Ex'r* v. *Miller*, 16 O. St. 582; *Farwell* v. *Johnston*, 84 Mich. 342; *Randall* v. *Randall*, 87 Mich. 563; *Bissell* v. *Taylor*, 41 Mich. 702 (8 N. W. Rep. 194); *Rhoades* v. *Davis*, 51 Mich. 309 (16 N. W. Rep. 659); *Robertson* v. *Robertson*, 25 Iowa 350; *Bank* v. *Owens*, 31 Md. 325; *Glenn* v. *Clark*, 58 Md. 580; *Dillinger's Appeal*, 35 Pa. St. 357, 361; *Reed* v. *Beasley*, 1 Blackf. 97; *Dutton* v. *Dutton*, 30 Ind. 452; *Hilbish* v. *Hattle*, 145 Ind. 59 (44 N. E. Rep. 20); Stew. Mar. & Div., §§ 182–190. A covenant by a husband to surrender, convey and transfer to his wife and her heirs, all his rights in her property which he may have acquired by reason of their marriage, she "to have the full and absolute control and possession of all the said property free and discharged of all the rights, claims or demands of every nature whatsoever" of the said husband, obligates him not to disturb his wife's enjoyment while she kept her property; to execute whatever instrument was necessary in order to release his right if she conveyed; and to claim no rights on her death, but to do whatever was necessary to clear the title from such rights then. *Polson* v. *Stewart*, 167 Mass. 211 (45 N. E. Rep. 737; 36 L. R. A. 771). In North Dakota it is provided by statute that a husband and wife may contract with each other with the respect to property the same as if they were unmarried. Laws 1899, p. 140.

Sec. 405. Conveyances between husband and wife. In California, a deed from a husband direct to his wife is valid, and love and affection are a sufficient consideration therefor. *Tillaux* v. *Tillaux*, 115 Cal. 668 (47 Pac. Rep. 691). Where the rights of creditors are not involved, a conveyance of land by a husband to his wife for a valuable consideration, is valid. *Reagle* v. *Reagle*, 179 Pa. St. 89 (36 Atl. Rep. 191; *Danforth* v. *Briggs*, 89 Me. 316 (36 Atl. Rep. 452). The same is true as to a voluntary conveyance by a husband to his wife, no fraud or imposition being practiced upon him. *Fitzgerald* v. *Fitzgerald*, 168 Mass. 488 (47 N. E. Rep. 431). By the stringent rules of the common law, a conveyance from a husband directly to his wife without the intervention of a trustee is void, but in courts of equity the object to be accomplished, and the con-

siderations upon which such conveyances are made, will be considered, and if found meritorious, and free from imposition and fraud, will be sustained; and this rule prevails even as against the husband's creditors. *Hill* v. *Meinhard*, 39 Fla. 111 (21 So. Rep. 805). Minn. Gen. Stat. 1894, § 5534, which provides that "no contract between a husband and wife, the one with the other, relative to the real estate of either, or an interest therein shall be valid," renders absolutely void a mortgage executed by a husband to his wife on real estate, although made after they had separated. *Phillips* v. *Blaker*, 68 Minn. 152 (70 N. W. Rep. 1082).

A married woman may convey her separate real estate to her husband, through the intervention of a trustee. *Leach* v. *Rains*, 149 Ind. 152 (48 N. E. Rep. 858). Applying Ala. Code, § 2849, it is held that a wife may convey her lands directly to her husband. *Osborne* v. *Cooper*, 113 Ala. 405 (21 So. Rep. 820). A conveyance of her separate property by a wife whose husband has refused to live with her because he believed her guilty of adultery, made to him in trust, the income to be paid part to her and part applied to the maintenance of their children, and as compensation to the husband in consideration of the renewal of their marital relations, which provides that she shall forfeit all interest in the property if she violates certain promises as to her martial conduct, is valid and will be enforced. *Duffy* v. *White*, 115 Mich. 264 (78 N. W. Rep. 868). Citing, *Burkholder's Appeal*, 105 Pa. St. 88. All deeds and conveyances of real estate heretofore made in Connecticut by a married woman directly to her husband are validated by Laws, 1899, p. 108, § 8. (Approved June 20, 1899).

Sec. 406. Husband's conveyance of wife's land. Where a wife is seised in fee of land not separate estate, and her husband makes a deed purporting to convey the fee, but void as to the wife, such deed vests in the grantee a life estate, either for the joint lives of the husband and wife, or by the curtesy, according to the facts, and the statute of limitations does not begin to run against the wife's reversion until the termination of said life estate. *Arnold* v. *Bunnell*, 42 W. Va. 478 (26 S. E. Rep. 359).

Sec. 407. Estates by entireties — Conveyance and incumbrance. In Indiana it is held that where a mortgage given by a husband and wife upon land held by them as tenants by the entireties, to a building and loan association, does not purport to be a security for the repayment of the money borrowed, but only attempts to secure the agreement and liability of the husband as a member of such association, to pay weekly dues, interest, premiums, fines, and assessments, until the debt is cancelled by the maturity of his stock, it is, as to the wife, a contract of suretyship and void, under Ind. Rev. Stat. 1894, § 6964. *Harrison Bldg. & Dep. Co.* v. *Lackey*, 149 Ind. 10 (48 N. E. Rep. 254). Where a husband and wife join in a conveyance of real estate, owned by them as tenants by the entireties, to a third person, the latter conveying to the husband who mortgages the property to secure an antecedent debt, owing by him to another who knew of the purposes for which the several transfers were made, it is held that the deeds and mortgage constitute substantially one transaction and are void, as an evasion of the statute which prevents a married woman from entering into a contract of suretyship. *Grzesk* v. *Hibberd*, 149 Ind. 354 (48 N. E. Rep. 361). In Missouri it is held that a husband's conveyance of an estate held by the entireties containing the statutory covenant of "grant, bargain and sell," passes the whole title where he survives the wife. *Hume* v. *Hopkins*, 140 Mo. 65 (41 S. W. Rep. 784). Applying Md. Const., Art. 3, § 43, providing that the "property of the wife shall be protected from the debts of her husband;" it is held that an estate by entireties cannot be subject to the payment of a mortgage executed by the husband. *McCubbin* v. *Stanford*, 85 Md. 378 (37 Atl. Rep. 214; 60 Am. St. Rep. 329). A recent statute in Indiana provides "That whenever a husband and wife shall own and hold any real estate as joint tenants or tenants by entireties, and one of them shall have been adjudged a person of unsound mind, by a court of competent jurisdiction, and when said insanity is probably permanent, they shall cease to hold and own said real estate as joint tenants or tenants by entireties, as the case may be, but the title to said real estate shall be owned and held by them as tenants in common. Said joint tenancy or tenancy by entireties shall not be converted into an estate in common, except

by a finding and judgment of the Circuit or Superior Court that one of the said parties has been adjudged a person of unsound mind and that said insanity is probably permanent, when said court shall enter a decree that said estate shall be and become an estate in common, which said action may be prosecuted by the guardian of said person of unsound mind or by the husband or wife, as the case may be, who is of sound mind." Laws 1899, p. 109.

Sec. 408. Inchoate interests. A wife who seeks to hold free from the operation of an execution sale of her husband's land, her inchoate interest therein, must allege particular facts showing that the judgments rendered were not such as bound her interest. *Davis* v. *Clements*, 148 Ind. 605 (47 N. E. Rep. 1056; 62 Am. St. Rep. 539). The inchoate right of a wife under Ind. Rev. Stat. 1894, § 2652, in land held by her husband as a cotenant, may be barred by a partition sale in an action to which she was not a party, notwithstanding Rev. Stat. 1894, § 2660, providing that no sale of the husband's property by virtue of any decree to which she shall not be a party shall affect her rights, as that section applies only where the wife is a necessary party, which she is not in such action. *Haggerty* v. *Wagner*, 148 Ind. 625 (48 N. E. Rep. 366; 39 L. R. A. 384). Where a husband and wife joined in a conveyance of her real estate to a trustee for the purpose of having the land divided between them by reconveyance by the trustee of separate parcels to each, and the deed to the trustee recited that "each of the grantors does release any and all interest in the tract so conveyed to the other which now or might hereafter exist on account of the marital relations of the two," it was held that the husband was barred from asserting rights as heir to the land reconveyed by the trustee to the wife, under Ind. Rev. Stat. 1894, § 2651. *Leach* v. *Rains*. 149 Ind. 152 (48 N. E. Rep. 858).

Sec. 409. Effect of divorce on real property rights. A divorce obtained by a wife terminates her husband's homestead rights in her property. *Kern* v. *Field*, 68 Minn. 317 (71 N. W. Rep. 393; 64 Am. St. Rep. 479). A decree of divorce is a bar to any action between the parties thereto to

enforce any property rights growing out of the marital relation. *Barnett* v. *Barnett*, N. M. (50 Pac. Rep. 837). Citing, *Thompson* v. *Thompson*, 132 Ind. 288 (31 N. E. Rep. 580); *Kamp* v. *Kamp*, 59 N. Y. 212; *Roe* v. *Roe*, 52 Kan. 724 (35 Pac. Rep. 809; 39 Am. St. Rep. 367); *Stahl* v. *Stahl*, 114 Ill. 375 (2 N. E. Rep. 160); *Patton* v. *Loughridge*, 49 Ia. 218; *Mott* v. *Mott*, 82 Cal. 413 (22 Pac. Rep. 1140.) Construing and applying Cal. Civ. Code, § 146, regulating the disposition of property upon dissolution of the marriage by divorce, which provides that "if a homestead has been selected from the separate property of either it shall be assigned to the former owner of such property subject to the power of the court to assign it for a limited period to the innocent party," it is held that such limited period cannot exceed the life of the innocent party. *Huellmantel* v. *Huellmantel*, 117 Cal. 407 (49 Pac. Rep. 574). Under Kan. Civ. Code, § 643, whenever a divorce is refused because the parties are in equal wrong or for any other cause, the court may make an equitable division and disposition of the property of the parties or either of them, whether the title thereto be in either or both. *Raper* v. *Raper*, 58 Kan. 590 (50 Pac. Rep. 502).

IMPROVEMENTS.

EPITOME OF CASES.

Sec. 410. Occupying claimants. Where the rightful owner of real property seeks relief from one who is *bona fide* in possession under color of title, and who has made valuable, lasting, and beneficial improvements, which enhance the value of the estate, such owner must do equity, by compensating the occupant to the extent of the benefits which accrue to the owner by reason of such improvements; but he is not liable for work performed, or for something done, which does not benefit the property, or enhance its value. *Bacon* v. *Thornton*, 16 Utah 138 (51 Pac. Rep. 153). One making permanent improvements on land as if his own, at a time when there was reason to believe his title good, is to be allowed their

value, so far as they enhance the value of the land; but if, when making them, he has notice, actual or constructive, of the superior right of another, he cannot be allowed them. One having notice of facts rendering his title inferior to another's, who, by mistake of law, regards his title good, cannot claim for permanent improvements. *Williamson* v. *Jones*, 43 W. Va. 562 (27 S. E. Rep. 411; 64 Am. St. Rep. 891; 38 L. R. A. 694). Where the plaintiff in ejectment has occupied the land under color of title for many years, making improvements thereon, a defendant claiming to own the land, may elect as to whether he will take the land and pay its increased value by reason of the improvements, or abandon the land to the plaintiff, upon payment by him of the value which it would have, had no improvements been made or placed upon the property. *McKensie* v. *A. P. Cook Co.*, 113 Mich. 452 (71 N. W. Rep. 868). Where a defendant in an action of ejectment seeks to assert a right as an occupying claimant, he must bring himself within the statutory provision applicable thereto. *Province* v. *Lovi*, 4 Okla. 672 (47 Pac. Rep. 476). Under Ala. Code 1886, §§ 2702, 2703, an allowance may be made to a defendant in ejectment for the planting of an apple orchard as a " permanent improvement." *Donehoo* v. *Johnson*, 113 Ala. 126 (21 So. Rep. 70.) Where one is entitled to compensation for improvements made to a farm on account of having set out an orchard thereon, in estimating his compensation, the value of the orchard when in full bearing and the care and attention bestowed upon the trees by him should be considered. *Lightner's Ex'x* v. *Speck*, Va. (28 S. E. Rep. 326). Particular case in which the right of an occupying claimant to recover for improvements made by him in good faith is upheld. *Thompson* v. *Thompson*, 53 Neb. 490 (73 N. W. Rep. 943).

Sec. 411. Improvements by purchasers. A purchaser at an assignee's sale whose title fails without his fault, is entitled to recover the reasonable value of any improvements placed by him upon the land in good faith during his occupancy under the purchase. *Thompson* v. *Buckner*, Ky. (40 S. W. Rep. 915). Construing and applying the statute of Mississippi giving the right to compensation for

improvements where the person making them "shall claim the premises under some deed or contract of purchase made in good faith," it is held that a purchaser at a guardian's sale which is void because never reported to, or confirmed by, the the court ordering it, may recover the value of improvements made by him in the honest belief that his title was good. The measure of recovery in such a case is the amount the market value of the land is enhanced by the improvements. *Hicks* v. *Blakeman*, 74 Miss. 459 (21 So. Rep. 7). Improvements made by a vendee in possession under an executory contract of purchase, if permanently attached to the land, become a part of the realty and belong to the vendor in case the vendee subsequently declines to comply with his contract of purchase and he has no right to remove them from the land. *Pomeroy* v. *Bell*, 118 Cal. 635 (50 Pac. Rep. 683). Citing, *King* v. *Johnson*, 7 Gray 279; *Westgate* v. *Wixon*, 128 Mass. 304; *Lapham* v. *Norton*, 71 Me. 88. Improvements made by a railroad company upon land purchased by it for a right of way, with constructive knowledge of a prior vendor's lien thereon, cannot be subjected to the payment of such lien. *First Nat. Bank* v. *Thompson*, 116 Ala. 166 (22 So. Rep. 668). The court say: "The general rule is, when fixed improvements are placed upon real property, they become realty, and subject to an existing mortgage or lien; but it would be inequitable to apply this rule when the right of eminent domain exists, and parties in good faith, under a purchase of land from the owner in fee, enter into possession, and subject the property to the same uses to which it might have been subjected by *ad quad damnum* proceedings. The most that a mortgagee or lienee can claim in such cases is full compensation for the lands appropriated. The powers of a court of equity are adequate to ascertain and decree the amount to be paid as damages or compensation. The case of *Railroad Co.* v. *Booraem*, 28 N. J. Eq. 450, is an authority directly in point; and the conclusion reached rests upon sound equitable principles, and is sustained by authorities cited."

Sec. 412. Improvements by tenants. Improvements by a widow having a life estate in lands in which her husband owned the fee, will be presumed to be intended for

his benefit. *Culleton* v. *Keune*, Ky. (39 S. W. Rep. 511). A lessee cannot remove a building erected by him unless his lease gives him a right to do so. Cal. Act. March 30, 1874, applied. *Board of Education* v. *Grant*, 118 Cal. 89 (50 Pac. Rep. 5). A provision in a lease which gives the lessee a right to make improvements, to a certain extent, and in which the lessee covenants " for himself, his heirs, administrators and assigns " to pay the lessee for such improvements at the expiration of the lease, does not give the latter any lien on the leased land for the improvements placed thereon, but his claim is merely a personal claim against the lessor which cannot be enforced against one to whom the land is conveyed after the termination of the lease and surrender by the lessee. *Gardner* v. *Samuels*, 116 Cal. 84 (47 Pac. Rep. 935; 58 Am. St. Rep. 135).

Sec. 413. Improvements by cotenants. Where one cotenant in common improves a part of the land he is entitled to have it allotted to him upon partition at a valuation made without the improvements. *Pipkin* v. *Pipkin*, 120 N. C. 161 (26 S. E. Rep. 697). A tenant in common who voluntarily improves the estate is entitled to compensation for such improvements upon partition; but he cannot maintain an action of assumpsit to recover any part of the cost of such improvements from his cotenants, and the statute of limitations does not run against his equitable right for compensation until a partition is asked. *Ballou* v. *Ballou*, 94 Va. 850 (26 S. E. Rep. 840; 64 Am. St. Rep. 733). A tenant in common who is also a lessee of his cotenant cannot be allowed in partition for improvements made upon the property in the course of his tenancy, which enhanced its value, and were made with the knowledge, but without the consent, of the cotenant, when the effect of such improvements was not to protect or preserve the property, but to aid the tenant in carrying on a business then prosecuted by him upon the premises, the increased income from which was not shared with the cotenant. *Cosgriff* v. *Foss*, 152 N. Y. 104 (46 N. E. Rep. 307; 36 L. R. A. 753). A cotenant, out of possession, who asserts a claim for rent against a cotenant in possession must account to the latter for improvements made by him, which have increased the rental

value. *Van Ormer* v. *Harley*, 102 Ia. 150 (71 N. W. Rep. 241).

Sec. 414. Improvements by trespasser having power of eminent domain. Improvements made by a railroad company upon land used by it for a right of way without any legal right, do not pass by a tax title of the land or by a decree against the company cancelling its interest therein. *Illinois Cent. R. Co.* v. *Le Blanc*, 74 Miss. 650 (21 So. Rep. 760). The court say: "This court and the courts of Michigan, Iowa, Illinois, Minnesota, Wisconsin, Oregon, Pennsylvania, Alabama, Florida, Texas, and other states have held that the general rule as to things affixed to the freehold by a trespasser or a person entering tortiously, is not applicable as against a body having the power of eminent domain, and entering without leave and making improvements for the public purpose for which it was created and given such power. In *Railway Co.* v. *Dunlap*, 47 Mich. 456 (11 N. W. Rep. 271), the court say: 'The railroad company, whether rightfully or wrongfully, laid this track while in possession, and for purposes entirely distinct from any use of the land as an isolated parcel. It would be absurd to apply to land so used, and to a railroad track laid on it, the technical rules which apply in some other cases to structures inseparably attached to the freehold. Whatever rule might apply in case of abandonment, it is clear that this superstructure was never designed to be incorporated with the soil except for purposes attending the possession; and in a proceeding to obtain a legal and permanent right to occupy the land for this very purpose there would be no sense in compelling them to buy their own property.' This case is cited by this court with approval in *Railway Co.* v. *Dickson*, 63 Miss. 380. Delivering the opinion of the court, Judge Campbell says: 'The railroad company was a trespasser in constructing its road upon land over which it had not acquired the right of way; but it still had the right to acquire the right of way unaffected by the liability incurred for its trespass. The trespass committed is not involved in the determination of the due compensation. The continuing right of the company to secure the right of way in accordance with its charter, and the nature of its entry on the land, and annex-

ing chattels to the soil, distinguish the case from that of a trespasser who affixes chattels to the freehold; and the rule of the common law, established when railroads were unknown, does not apply.' In *Daniels* v. *Railroad Co.*, 85 Ia. 129 (14 Am. Rep. 490), where, after a recovery in ejectment by the owner of the land, and the railroad company instituted condemnation proceedings, the court held that the value of the improvements put on the land by the railroad company were not to be considered in assessing the damages. In *Justice* v. *Railroad Co.*, 87 Pa. St. 28, there had been a judgment in ejectment in favor of the landowner, and the court held that the recovery did not include the chattels put upon the land by the company and the structures they compose. To the same effect are *Jones* v. *Railway Co.*, 70 Ala. 227, and *Railway Co.* v. *Adams*, 28 Fla. 631 (10 So. Rep. 465; 14 L. R. A. 583), where the mandate was withheld by the supreme court for a reasonable time to allow the railroad company to institute condemnation proceedings.

Sec. 415. Improvements upon mortgaged land. Permanent improvements upon mortgaged land which become a part of the realty, whether placed there by the mortgagor or one claiming under him, inure to the benefit of the mortgagee, and subsequent mortgagees can only claim the surplus if any remains, after the first mortgage lien is satisfied. *Mutual Benefit Life Ins. Co.* v. *Huntington*, 57 Kan. 744 (46 Pac. Rep. 19).

INFANTS AND INSANE PERSONS.

EPITOME OF CASES.

Sec. 416. Validity of deeds of infants and insane persons. In South Carolina it is held that the deed of an insane person is voidable but not absolutely void; that where a purchase is made from such a one in good faith without knowledge of the incapacity and no advantages taken, for a full consideration, which goes to the benefit of the lunatic,

courts of equity will not interfere. In case such a transaction is set aside, the lunatic can be charged only with such benefit as he actually received. *Creekmore* v. *Baxter*, 121 N. C. 81 (27 S. E. Rep. 994). The appointment, by a minor, of an attorney to sell and convey real estate, and a conveyance by the attorney under such appointment, is not void but merely voidable and capable of ratification by the infant on attaining his majority. *Coursolle* v. *Weyerhauser*, 69 Minn. 328 (72 N. W. Rep. 697). In order to justify setting aside the contract of an insane person not under guardianship on the ground of insanity, it must appear that the contract was made with the knowlege of such incapacity or such information with respect thereto as would lead a prudent person to the belief of the incapacity. *Rhoades* v. *Fuller*, 139 Mo. 179 (40 S. W. Rep. 760). To set aside the deed of an insane person, it is not necessary to prove that there was fraud or other wrong doing inducing its execution; and such a deed may be set aside without returning the consideration,—at least when it does not appear that a return in specie is practicable. *Wager* v. *Wagoner*, 58 Neb. 511 (78 N. W. Rep. 987).

Sec. 417. Disaffirmance—Duty of infant. Knowledge of the fact of the execution of a deed by himself may be imputed to an infant if, at the time of its execution, he has arrived at such years of discretion as that, in the ordinary course of events, he can be reasonably supposed to take an account of his action, and of incidents occurring in his career; and although, upon his becoming of age, such a deed does not operate as an absolute estoppel upon him, yet he is then, and from that time, chargeable with knowledge of the legal effect of his deed and must thereafter, within a reasonable time, disaffirm his act, or he is bound by his deed, even though there be no actual adverse possession thereunder. *Bentley* v. *Greer*, 100 Ga. 35 (27 S. E. Rep. 974).

Sec. 418. Judicial sale of infant's lands. Under Ky. Stat. 1894, §§ 2084, 2089, it is held that the real estate belonging to infants cannot be sold or made liable to charges of any kind until the character and necessity of such proposed liability for the benefit of the infant has been consid-

ered and approved by a court of chancery authorized to decree such sale. *Dixon* v. *Hosick*, Ky. (41 S. W. Rep. 282). Overruling, *Jarrett* v. *Andrews*, 7 Bush. 313. For application of provisions of Kentucky Civil Code as to the sale of infant's land for reinvestment, see *Loeb* v. *Struck*, Ky. (42 S. W. Rep. 401). Ky. Civ. Code, § 489, construed and applied—sale of insane person's land. *Buckler* v. *Rees*, 100 Ky. 336 (38 S. W. Rep. 492). A decree for the sale of an intestate's lands rendered against infants without the appointment of a guardian *ad litem*, is not void but erroneous and their remedy is by appeal, under Ky. Civ. Code, § 745. *Oliver* v. *Park*, Ky. (39 S. W. Rep. 423). It is proper for the guardian of a lunatic to ask the court for instructions concerning the administration of his trust; he has no title to his ward's property and aside from the power to make necessary repairs and improvements, can exercise no control over the estate unless authorized by the statute; and upon a review of the statutes of that state, it is held in New Jersey that a court of equity has no power in a proceeding by the guardian to which the ward is not made a party, to authorize a conveyance of real estate held in trust by such ward. *Cooper* v. *Wallace*, 55 N. J. Eq. 192 (36 Atl. Rep. 575).

INSURANCE.

PLACE v. ST. PAUL TITLE INSURANCE AND TRUST CO.

(67 Minn. 126.)

Insurance of title to land—Construction of policy—Defects of title excepted. *Held*, that the phrase, "Tenancy of the present occupants," stated in a title insurance policy as a defect in or objection to the title against which the insurer does not insure, must be construed as meaning the tenancy which arises through the occupation of temporary possession of the premises by those who are tenants in the popular sense in which the word "tenant" is used. The phrase does not include the claim of a person who, asserting ownership in fee as against the title insured, is in actual adverse possession at the time the policy is issued.

Insurance of title to land—Construction of policy—Condition precedent to a right of action upon the policy. *Held*, further, that a condition precedent to a right of action upon the policy, which prohibited a recovery unless the insured had contracted to sell the estate or interest covered by the policy, and the title has been declared, by a court of last resort of competent jurisdiction, defective or incumbered by reason of a defect or incumbrance for which the company would be liable under the policy has no application to a case where the land is held by another party in actual adverse possession, and the insured has lost it absolutely by reason of a defect in the insured title.

(Syllabus by the Court.)

COLLINS, J.

Sec. 419. Statement of the case. Two questions only are presented by this appeal; both depend upon the construction to be placed upon language used in a title insurance policy issued by defendant company to plaintiffs as mortgagees of certain real property. The contract, as stated in the policy, was, among other things, to indemnify, keep harmless and insure plaintiffs from all loss or damage, not to exceed a stated sum of money, sustained by reason of defects in the title of the mortgagors in the mortgaged estate, excepting such as were set forth in an attached schedule, and subject, also, to the stipulations and conditions made a part of the policy. In the schedule an item, stated as "Tenancy of the present occupants," was mentioned as a defect in or objection to the title against which the company did not insure; and among the stipulations and conditions of the policy was one that: "No right of action shall accrue under this policy unless the insured, or those claiming under him as aforesaid, shall have been actually evicted under an adverse title not mentioned or referred to in the above Schedule B, or unless there has been a final judgment upon a lien or incumbrance not mentioned or referred to in said Schedule B, under which the title of the insured will be divested by sale under judgment or foreclosure, or unless the insured has contracted to sell the estate or interest insured, and the title has been declared, by a court of last resort of competent jurisdiction, defective or incumbered by reason of a defect or incumbrance for which the company would be liable under this policy." From the complaint it appeared that, at a foreclosure sale of the mortgaged premises,

the plaintiffs purchased the same for the full amount due on the debt; that no redemption had been made within the statutory period; that, at the date the mortgage was delivered, and when the policy was issued, the mortgagors were not the owners, in fee or otherwise, of a portion of the mortgaged premises, nor were they in possession, but, to the contrary, said portion was then, and ever since has been, owned and in the actual adverse possession and occupancy of other persons; and that, prior to the issuance of the policy, the mortgagors had been evicted therefrom.

Sec. 420. Insurance of title to land—Construction of policy—Defects of title excepted. It is the position of defendant's counsel that, from the allegations of this complaint, it appears that the case in hand was expressly excepted from the policy because of the words in the schedule, "Tenancy of the present occupants." If we were to give these words their broadest signification, and construe them without regard to the object or purpose of the contract, or the language used elsewhere, the position would be quite easily sustained; for the broad definition of a "tenant" is one who holds or possesses lands or tenements by any kind of right or title, whether in fee, for life, for years, at will, or otherwise. The persons mentioned in the complaint as having been, and as still continuing, in adverse possession, are certainly tenants, within this comprehensive definition. But, when we read the entire policy, and consider its object and alleged purpose,—that it purported to be a contract to indemnify plaintiffs, as mortgagees, against loss or damage sustained by reason of defects in the mortgagors' title; that, if the construction contended for by counsel for the defendant should prevail, it would apply in cases where the entire premises were in the adverse possession of another, as well as those, like the present, where only a part is held adversely, leaving the policy-holder remediless when he has actually bought and paid for protection; that, if the design of the defendant was to exclude from its policy all liability as to the title "of the present occupants," it could have said so by simply changing one word of the phrase, "tenancy of the present occupants," which, at most, is ambiguous only; that, where an expression in an

insurance policy is of such a character, the ambiguity is to be construed against the insurer, and in favor of the insured; that the word "tenant" is generally used in a popular sense, and, as mentioned in this sense, according to Webster, "one who has the occupation or temporary possession of lands or tenements whose title is in another; correlative to landlord;" and also that, without a provision of this import, the insurer would probably incur a liability if there were outstanding leases, and the insured could not obtain possession at any moment,—we are decidedly of the opinion that the tenancy mentioned in the schedule was that which has arisen through the occupation or temporary possession of part or all of the premises by those who were tenants, in the popular sense in which that word is used. See *Caplis* v. *Insurance Co.*, 60 Minn. 376 (62 N. W. Rep. 440; 51 Am. St. Rep. 535).

Sec. 421. Insurance of title to land—Construction of policy—Condition precedent to right of action upon the policy. As the complant fails to allege the occurrence of any of the conditions precedent, hereinbefore quoted, as found in the policy, counsel for appellant urge this as another reason why the general demurrer should have been sustained. A final judgment upon a lien or incumbrance certainly has no reference to a case like this. And counsel practically concede that the condition requiring actual eviction under adverse title has no application, for the defect upon which plaintiffs base their cause of action is inability to obtain possession, and entire want of title, and nothing else. It is really admitted by counsel that, if any of these conditions precedent stand in the way of a recovery upon the present complaint, it must be that which prohibits recovery unless the insured has contracted to sell the estate or interest insured, and the title has been declared by a court of last resort of competent jurisdiction defective or incumbered by reason of a defect or incumberance for which the company would be liable under the policy. If this condition was intended to apply to a case of this character, it demands of plaintiffs that, with full knowledge of a total want of title to a part of the premises, they find some one upon whom they can impose by entering into a contract to sell that which they do not own, or that they enter

into a sham contract of sale, have the vendee refuse to perform, bring a suit against him, and then go through the form of an action which is fictitious from start to finish, and a fraud upon the court in which it is prosecuted. They are either compelled to perpetrate a fraud upon the innocent vendee, or a fraud upon the court in which they bring the action. We can not believe that the defendant company ever intended the condition in question to cover a case like this, but, rather, that it was designed to guard against actions for nominal damages, instituted by persons who had ascertained that defects existed in their titles, but whose possession remained undisturbed, and who had suffered no loss. It was an adaptation of the law relating to covenants in a deed, that actual loss must precede actual compensation, to the title insurance business. None of the conditions found in the quoted language apply to a case where not only does another party hold possession of the land adversely to the insured but the latter has lost it absolutely by reason of a defect in the insured title. Order affirmed.

Sec. 422. Title insurance. A policy of insurance issued upon a mortgage which covenants to indemnify the holder against "all loss * * * by reason or defects of unmarketableness of the title to the estate or interest insured, * * * or because of liens or incumbrances charging the same at the date of this policy, * * * saving * * * defects or objections to title, and liens, charges and incumbrances thereon, which do or may now exist," including "unmarketability by reason of the possibility of mechanics' liens, and municipal liens," but not "actual losses by reason of such liens," insures only against liens the rights to which are already inchoate at the date of the policy. *Wheeler* v. *Real Estate Tit. Ins. & T. Co.*, 160 Pa. St. 408 (28 Atl. Rep. 849). Where a policy of insurance of title provides that any untrue answer to questions contained in the application shall avoid the policy, the answers amount, in effect, to a warranty, and the matter of their materiality is not open. A question in an application, "What was the last price paid?"—calls for the actual, and not merely a nominal price,—the price in money or money's worth. *Stensgaard* v. *St. Paul Real Estate Tit. Ins. Co.*, 50 Minn. 429 (52 N. W. Rep. 910; 17 L. R. A. 575). A title insurance company is not relieved from liability under a policy providing for indemnification of a mortgagee from all loss or damage not exceeding the mortgage debt, by reason of defects in the title or of liens or incumbrances existing thereon at the date of the policy, by the purchase by the mortgagee, on foreclosure of the mortgage, of the premises for the full amount of the mortgage debt, where there were prior mechanics' liens which he was obliged to discharge,—especially where the policy provides that satisfaction of the

mortgage debt, except by foreclosure of the mortgage, shall terminate the policy. *Minnesota Tit. Ins. Co.* v. *Drexel*, 36 U. S. App. 50 (17 C. C. A. 56; 70 Fed. Rep. 194). Where a title insurance company which agreed to indemnify, save harmless, and insure the insured mortgagee against loss, not exceeding a specified amount, by reason of incumbrance on the mortgaged premises and defects in the title to the same, having an option, in case suit is brought on account of claim against the property, to defend the suit, pay the claim, or pay the insured the amount of its liability under the policy, elects to defend such a suit, it will be held liable to the insured for damages resulting to him on account of its negligence in conducting such defense and the amount of recovery for loss caused by such negligence is not limited to the amount of the insurance provided for in the policy. *Quigley* v. *St. Paul Tit. Ins. & Trust Co.*, 60 Minn. 275 (62 N. W. Rep. 287). Where the insurer of the priority of a mortgage discharges other liens which have been adjudged prior to the mortgage, it is entitled, as against the mortgagor, to be subrogated to the mortgagee's rights in all securities held by him to protect his interest as mortgagee against such liens. *St. Paul Title Ins. & T. Co.* v. *Johnson*, 64 Minn. 492 (67 N. W. Rep. 543). A recent statute in North Carolina provides for the organization of companies "for the purpose of examining titles to real estate, of furnishing information in relation thereto, and of insuring owners and others interested therein against loss by reason of incumbrances and defective title." Laws 1899, p. 162. Ky. Stat. 1894, §§ 730 734 being part of an act to provide for the creation and regulation of real estate title insurance companies are amended by Laws 1898, p. 117.

EPITOME OF CASES.

Sec. 423. Insurable interest. An owner of land has an insurable interest in buildings in course of erection thereon, by a contractor who has furnished all materials and labor, to be paid upon the completion of the work. *Foley* v. *Mft'rs & Bldrs. Fire Ins. Co.*, 152 N. Y. 131 (46 N. E. Rep. 318). A son, in possession and control of land which his father has devised to him, has an insurable interest in buildings thereon, although the father bought the land at a partition sale and is awaiting his deed for the confirmation of the report. *Home Ins. Co.* v. *Mendenhall*, 164 Ill. 458 (45 N. E. Rep. 1078; 36 L. R. A. 374). Where there has been a foreclosure sale of real estate, and on account of the purchaser's failure to comply with his purchase, the attorneys of the mortgagor procure an order of court for a resale at the risk of the purchaser, they have an insurable interest in the property. *Hartford Fire Ins. Co.* v. *Keating*, 86 Md. 130 (38 Atl. Rep. 29; 63 Am. St. Rep. 499).

Sec. 424. Insurance by life tenant. Where the expense of insurance is made a charge against a person entitled to receive for life the income of the property such a life-tenant shall at the risk of the consequences of committing waste if neglected, insure, for the benefit of the whole property, its principle or corpus, so that, in case of loss, the proceeds may be either expended in the way of repair or be preserved as a substitute for the property lost. *Hopkins* v. *Keazer*, 89 Me. 347 (36 Atl. Rep. 615). In South Carolina it is held that a life tenant insuring buildings upon the premises in his own name, occupies a trust relation, and money collected on account of such insurance should be used in rebuilding or should go to the remaindermen, reserving the interest for life for the life tenant. *Geeen* v. *Green*, 50 S. C. 514 (27 S. E. Rep. 952; 62 Am. St. Rep. 846). Following, *Clyburn* v. *Reynolds*, 31 S. C. 118 (9 S. E. Rep. 978). See Ballards' Law Real Prop., Vol. V, §§ 402, 408.

Sec. 425. Rights of mortgagee as to insurance. A vendor who takes a purchase money mortgage to secure the payment of the purchase price, which stipulates that the mortgagor shall keep the property insured for the benefit of the mortgagee, does not, by assigning an existing policy of insurance on the property to the vendee, release his right to share in its proceeds as mortgagee. *McDonold* v. *Basom*, 102 Ia. 419 (71 N. W. Rep. 341). Where the policy provides for the payment of any loss to the mortgagee as his interest may appear, he may maintain an action on the policy alone in case of loss, where his debt exceeds the loss. *Peck* v. *Girard Fire & M. Ins. Co.*, 16 Utah 121 (51 Pac. Rep. 255); *Lowry* v. *Insurance Co.*, 75 Miss. 43 (21 So. Rep. 664; 65 Am. St. Rep. 587; 37 L. R. A. 779). In the last case the court reviews the conflicting authorities and cites in support of its holding, *Chipman* v. *Carroll*, 53 Kan. 163 (35 Pac. Rep. 1109; 25 L. R. A. 305); *Motley* v. *Insurance Co.*, 29 Me. 337 (50 Am. Dec. 591); *Maxcy* v. *Insurance Co.*, 54 Minn. 272 (55 N. W. Rep. 1130; 40 Am. St. Rep. 325); *Pitney* v. *Insurance Co.*, 65 N. Y. 6. But there can be no recovery by the mortgagee where the property is burned by the owner for the purpose of realizing on the policy. *Hocking* v. *Virginia Fire & M.*

Ins. Co., 99 Tenn. 729 (42 S. W. Rep. 451; 68 Am. St. Rep. 862; 39 L. R. A. 148). Citing, *Insurance Co.* v. *Fix*, 58 Ill. 151; *Hale* v. *Insurance Co.*, 6 Gray 169 (66 Am. Dec. 410); *Pupke* v. *Insurance Co.*, 17 Wis. 378 (84 Am. Dec. 754); *Grosvenor* v. *Insurance Co.*, 17 N. Y. 391. Where a mortgagee, holding a fire insurance policy providing that the loss, if any, shall be payable to the mortgagee as his interest might appear, which was procured and paid for by the mortgagor, foreclosed his mortgage and bid in the premises at the sale for the full amount of his debt, and before the expiration of the time for redemption, the dwelling house covered by the mortgage and policy was injured by fire, it is held that the insurance company having paid the loss to the mortgagee, he was entitled to retain the money, no redemption having been made from the sale. *Carlson* v. *Presbyterian Bd. Rlf. for Disabled Ministers*, 67 Minn. 486 (70 N. W. Rep. 8). One who takes an assignment of the right to recover for a loss under an insurance policy with knowledge that the mortgagee claims some rights thereunder, takes subject to the rights of such mortgagee and such mortgagee may be subrogated to a judgment rendered in favor of the assignee in such an action. *McDonald* v. *Basom*, 102 Ia. 419 (71 N. W. Rep. 341).

Sec. 426. Mortgage clause — Conditions against change of title. An insurance policy taken out by an executor who has no interest in the property, which provides for the payment of the loss to the mortgagee as his interest may appear, is not rendered void as to such mortgagee by reason of the condition therein that "this entire policy * * * shall be void if the interest of the insured be other than unconditional, having sole ownership, or, if the subject of insurance be a building on ground not owned by the insured in fee simple," where it appears that no written application was made for the insurance and no fraudulent representations of title were made at the time of effecting the insurance. *Burrows* v. *McCalley*, 17 Wash. 269 (49 Pac. Rep. 508). A provision in an insurance policy providing for the payment of a loss, if any, to a mortgagee, that as to the interest of the mortgagee the insurance shall not be invalidated by any act or neglect of the mortgagor, nor by any change in title or possession, or by legal

process or voluntary conveyance, provided the mortgagee shall notify the insurer of any change of ownership which shall come to the knowledge of the mortgagee and have permission for such change of ownership endorsed on the policy, has reference to a change or transfer of title or possession to a third person and not to one from the mortgagor to the mortgagee through a foreclosure. *Pioneer Sav. & L. Co.* v. *St. Paul F. & M. Ins. Co.*, 68 Minn. 170 (70 N. W. Rep. 979). Construing a similar mortgage clause, it is held that the commencement of a suit to foreclose a mortgage and the appointment of a receiver to take charge of the property are not such a breach as will avoid the policy. *Lancashire Ins. Co.* v. *Boardman*, 58 Kan. 339 (49 Pac. Rep. 92; 62 Am. St. Rep. 621). Construing an insurance policy issued to a mortgagee, to which was attached a similar mortgage clause, but the body of which contained a condition that the policy should be void in case of any change of title or possession taking place other than by death of the insured it is held that the policy was not forfeited by the commencement of foreclosure proceedings between the dates of the application and the issuance of the policy, nor by the execution of a deed by the mortgagor for the premises, which was accepted before the loss. *Pioneer Sav. & L. Co.* v. *Providence Wash. Ins. Co.*, 17 Wash. 175 (49 Pac. Rep. 231; 38 L. R. A. 397). The court say: "We believe the rule supported by the better authority is that the contract of insurances with a mortgagee by an insurance company is a separate, distinct contract from that of the owner of the property, and that it is in contemplation between the parties to the contract that a change of title may occur, and that a third person or the mortgagee may become the owner, and that the ordinary stipulation in insurance policies in such contracts, that the mortgagee shall notify the insurance company of a change of title, is one not a substantive part of the contract, for violation of which a forfeiture will lie, but is simply a subsequent breach of the contract, for which damages may lie if the insurance company is injured."

Sec. 427. "Sole and unconditional ownership of property"—Construction of forfeitures. Where a wife has no claim upon the real estate of her husband in his con-

veyance of which she does not join, except she survive him, one holding under such a deed is "absolute owner" within the meaning of that term in an insurance policy. Ind. Rev. St. 1894, § 2652, applied. *Ohio Farmers' Ins. Co.* v. *Bevis*, 18 Ind. App. 17 (46 N. E. Rep. 928.) In an action on an insurance policy, the claimant sufficiently shows "sole and unconditional" ownership of the property, by proving that he was in possession of it, claiming it as his own and exercising acts of ownership over it when the policy was issued, until the defendant has overcome such *prima facie* evidence of title. *Sprigg* v. *American Cent Ins. Co.*, Ky. (40 S. W. Rep. 575). A warranty by the insured that he is the sole and undisputed owner of the land and property insured, is not broken where the insured is in possession of the land under a contract of purchase which he has completely performed and is entitled to a conveyance. *Baker* v. *State Ins. Co.*, 31 Ore. 41 (48 Pac. Rep. 699; 65 Am St. Rep. 807). Citing, *Insurance Co.* v. *Staats*, 102 Pa. St. 529; *Insurance Co.* v. *Dougherty*, 102 Pa. St. 568; *Insurance Co.* v. *Erb*, 112 Pa. St. 149 (4 Atl. Rep. 8); *Insurance Co.* v. *Dyches*, 56 Tex. 573; *Hough* v. *Insurance Co.*, 29 Conn. 10 (76 Am. Dec. 581); *Gaylord* v. *Insurance Co.*, 40 Mo. 15 (93 Am. Dec. 289); *Swift* v. *Insurance Co.*, 18 Vt. 305; *Pelton* v. *Insurance Co.*, 77 N. Y. 605; *Rumsey* v. *Insurance Co.*, 17 Blatch. 527 (1 Fed. Rep. 396); *Martin* v. *Insurance Co.*, 44 N. J. L. 490; *Bonham* v. *Insurance Co.*, 25 Ia. 328, 335. Where the insurer makes no inquiry as to the title and the insured makes no representations relative thereto with intent to deceive, an insurance policy is not vitiated by a condition that it shall be void "if the subject of insurance be * * * on ground not owned by the insured in fee simple," in a case where the insured had paid the full purchase price but had not yet received the deed from his vendor. *Dooley* v. *Hanover Fire Ins. Co.*, 16 Wash. 155 (47 Pac. Rep. 507; 58 Am. St. Rep. 26). The fact that the owner of a building, by mistake as to the boundaries of the lot, built it so that it stood twenty feet in the street and two feet on the adjoining lot of another, does not create a breach of condition in an insurance policy providing that, "if the subject of insurance be a building on ground not owned by the insured in fee simple," the

policy shall be void, where it appears that no objection to the encroachment upon the adjoining lot has ever been made by any one and the owner is presumed to be the owner in fee of the street to the center thereof. *Haider* v. *St. Paul Fire & M. Ins. Co.*, 67 Minn. 514 (70 N. W. Rep. 805). An insurance policy is not avoided for the reason that the interest of the insured was "other than unconditional and sole ownership," where the property was devised to the insured "to be his forever for his own proper use," subject only to a restriction of alienation until he attained the age of thirty years. *Yost* v. *McKee*, 179 Pa. St. 381 (36 Atl. Rep. 317; 57 Am. St. Rep. 604). A policy of insurance on a building, issued to husband and wife, containing a condition that it is to be void if the building was on "ground not owned by the insured in fee simple," is not invalidated by the fact that one of them owned the land in fee simple while both owned the building. *Demuth* v. *Old Town Bank*, 85 Md. 315 (37 Atl. Rep. 266; 60 Am. St. Rep. 322). Where ratification of the sale by a court is necessary to pass title to a purchaser at a foreclosure sale, until such ratification, his interest is not "unconditional and sole," within the requirement of an insurance policy. *Hartford Fire Ins. Co.* v. *Keating*, 86 Md. 130 (38 Atl. Rep. 29; 63 Am. St. Rep. 499).

Sec. 428. Change in insured's title—Liens and incumbrances. A provision in an insurance policy that "this policy * * * shall be void * * * if any change other than by the death of an insured takes place in the interest, title or possession of the subject of the insurance * * * whether by legal process or judgment, or by voluntary act of the insured, or otherwise," is held not to be violated by the insured executing a mortgage of the property, as the term "change" means a transfer of interest or title, not an incumbrance simply. *Peck* v. *Gerard Fire & M. Ins. Co.*, 16 Utah 121 (51 Pac. Rep. 255). Citing, *Barry* v. *Insurance Co.*, 110 N. Y. 1 (17 N. E. Rep. 405); *Judge* v. *Insurance Co.*, 132 Mass. 521; *Insurance Co.* v. *Spankneble*, 52 Ill. 53. To the same effect is the case of *Lampasas Hotel & Park Co.* v. *Phœnix Ins. Co.*, Tex. Civ. App. (38 S. W. Rep. 361). Such a condition is not violated by the existence of a

mortgage on the property at the time the insurance is issued. *Cowart* v. *Capital City Ins. Co.*, 114 Ala. 356 (22 So. Rep. 574). Merely permitting the filing of a claim for a mechanic's lien against property does not violate a condition against permitting the property to become incumbered. *Omaha Fire Ins. Co.* v. *Thompson*, 50 Neb. 580 (70 N. W. Rep. 30). Where mechanics' liens have been filed against property at the time a policy of insurance was issued thereon, which contained a condition forbidding "a change in the interest, title, or possession of the subject of insurance, whether by legal process, or judgment, or by voluntary act of the insured or otherwise," it is held that a subsequent foreclosure of such mechanics' liens and a sale of the property thereunder, did not avoid the policy so as to prevent a recovery thereon, for a loss which happened before the expiration of the time given the owner for redemption. *Greenlee* v. *North British & Mer. Ins. Co.*, 102 Ia. 427 (71 N. W. Rep. 534; 68 Am. St. Rep. 455). Where it is sought to invalidate an insurance policy on account of a violation of a condition against incumbrances by showing the existence of a mechanic's lien against a portion of a building on the same lot upon which the insured property stands, the evidence must clearly show that the building is the same building covered by the insurance policy. *Greenlee* v. *Iowa State Ins. Co.*, 102 Ia. 260 (71 N. W. Rep. 224).

Where a condition in an insurance policy against incumbrances does not avoid it because of the insured's knowledge of an existing incumbrance, a subsequent renewal thereof, or a new incumbrance given for the purpose of discharging the old one, does not affect the validity of the policy. *Koshland* v. *Home Mut. Ins. Co.*, 31 Or. 321 (49 Pac. Rep. 864); *Koshland* v. *Fire Ass'n*, 31 Or. 362 (49 Pac. Rep. 865). In the first case the court say: "There is some diversity of opinion in the adjudged cases as to whether, after an existing mortgage has been paid and discharged, the assured can give another for the same or a less amount without violating the condition of the policy against incumbrances; but where the new mortgage is given merely in lieu of an existing incumbrance, reason as well as authority favors the doctrine that it does not increase the risk, and therefore is no violation of the

conditions of the policy against incumbrances. *Bowlus* v. *Insurance Co.*, 133 Ind. 106 (32 N. E. Rep. 812; 20 L. R. A. 400); *Kister* v. *Insurance Co.*, 128 Pa. St. 553 (18 Atl. Rep. 447; 15 Am. St. Rep. 696; 5 L. R. A. 646); *Dwelling-House Ins. Co.* v. *Gould*, 134 Pa. St. 570 (19 Atl. Rep. 793); *Weiss* v. *Insurance Co.*, 148 Pa. St. 349 (23 Atl. Rep. 991); *Insurance Co.* v. *Saindon*, 52 Kan. 486 (35 Pac. Rep. 15; 39 Am. St. Rep. 356); *Insurance Co.* v. *Stein*, 72 Miss. 943 (18 So. Rep. 414); *Russell* v. *Insurance Co.*, 71 Ia. 69 (32 N. W. Rep. 95)."

Sec. 429. Vacant and unoccupied premises. What is meant by the term "vacant and unoccupied" in an insurance policy is a question of law, but whether a building was vacant and unoccupied at the time of a loss, within the meaning of a policy, is a question of fact. *Home Ins. Co.* v. *Mendenhall*, 164 Ill. 458 (45 N. E. Rep. 1078; 36 L. R. A. 874). A forfeiture on account of nonoccupancy is not necessarily prevented by the fact that the furniture of the insured remained in the house, and his hired man made a frequent inspection of the household goods and had a general oversight of the buildings during the day, such supervision not being a full equivalent for the constant supervision involved in the occupancy of the premises as the customary place of abode, and the actual presence in the building of those who are living in it and using it as a dwelling house day and night. *Hanscom* v. *Home Ins. Co.*, 90 Me. 333 (38 Atl. Rep. 324). Construing Me. Rev. Stat., ch. 49, § 20, providing that "a change in the property insured or in its use or occupation, or a breach of any of the terms of the policy by the insured, do not affect the policy unless they materially increase the risk," it is held that an insurance company seeking the benefit of a forfeiture clause on account of the nonoccupancy of the premises, has the burden of showing that such nonoccupancy materially increased the risk, but such burden of proof may be sufficiently sustained in every instance by the natural presumption to that effect, which is based upon observation and experience of intelligent men generally. *Jones* v. *Granite State Fire Ins. Co.*, 90 Me. 40 (37 Atl. Rep. 326). The court say: "The presumption which in this case is strong enough to stand as *prima facie*

proof, until contradicated by evidence, is denominated as a presumption of fact sanctioned by the law, or a mixed presumption of law and fact. The law authorizes its adoption because it is in consonance with reason and experience, and because from its importance and frequency of occurrence it has attracted the attention of the law and received its commendation. The fact that any property is not in the possession or under the close supervision of its owner naturally produces a belief that it is exposed to more than usual risks, such risks being more or less, according to circumstances. Insurance companies invoke the benefit of this sort of presumption, and we think they are entitled to it in aid of the burden of proof which the statute imposes on them." Particular case in which an insurance policy was held not invalidated on account of the violation of the condition against vacancy. *Clifton Coal Co.* v. *Scottish U. & Nat. Ins. Co.*, 102 Ia. 800 (71 N. W. Rep. 433).

Sec. 430. Conditions against additional insurance. The fact that a policy of insurance procured in the name of the owner provides for the payment of the loss to a mortgagee, does not make the mortgagee the insured within the meaning of a condition in the policy rendering it void if the insured procured double insurance. *Holbrook* v. *Baloise Fire Ins. Co.*, 117 Cal. 561 (49 Pac. Rep. 555). Citing, *Williamson* v. *Insurance Co.*, 86 Wis. 895, 896 (57 N. W. Rep. 46; 39 Am. St. Rep. 906); *Gillett* v. *Insurance Co.*, 78 Wis. 208 (41 N. W. Rep. 78; 9 Am. St. Rep. 784); *Moore* v. *Insurance Co.*, 141 N. Y. 219 (36 N. E. Rep. 191); and note in 28 Am. Law Reg. (N. S.) pp. 221–248. Where a mortgagee, of his own motion, takes out insurance in the name of the mortgagor or owner of the property without authorization of the latter, and causes the loss, if any, to be made payable to the mortgagee, it is, in effect, insurance by the mortgagee of his interest for his account and does not constitute "other insurance" so as to vitiate a prior policy issued to the mortgagor, which prohibits other insurance. *Cannon* v. *Home Ins. Co.*, 49 La. 1367 (22 So. Rep. 887). The same is held as to a policy taken out by the owner's agent to procure a loan for him without his knowledge and

made payable to the mortgagee. *Cowart* v. *Capital City Ins. Co.*, 114 Ala. 356 (22 So. Rep. 574).

Sec. 431. Condition against increase of hazard—Exception of loss by explosion. A condition in an insurance policy avoiding it if the hazard be increased by any means within the insurer's knowledge, or if fire works are allowed on the premises, is broken by the storage of fire works in a residence on one evening to be used the next day, from which fire ensues and destroys the insured property. *Heron* v. *Phœnix Mut. Fire Ins. Co.*, 180 Pa. St. 257 (36 Atl. Rep. 740; 57 Am. St. Rep. 638; 36 L. R. A. 517). Where property covered by an insurance policy which contained a provision that "this insurance does not apply to or cover any loss by explosion, unless fire ensues, and then the loss or damage by fire only," and had attached thereto a special clause providing "that this policy insures against any loss or damage caused by lightning to the interest of the assured in the property described, not exceeding the sum insured, and subject in all other respects to the terms and conditions of the policy," was destroyed by the explosion of powder stored across the street in a building, of which storage neither party had any notice, occasioned by the lightning striking the building adjoining the powder, it is held that, within the meaning of the clauses recited, the loss was occasioned by an explosion which was not included in the risk and the company is not liable. *German. Fire Ins. Co.* v. *Roost*, 55 O. St. 581 (45 N. E. Rep. 1097; 60 Am. St. Rep. 711).

Sec. 432. Waiver of conditions of forfeiture. The existence of a mortgage in violation of a condition in an insurance policy, will not affect its validity where the agent has notice of it at the time he issues the policy. *Cowart* v. *Capital City Ins. Co.*, 114 Ala. 356 (22 So. Rep. 574). Where, at the time the policy is issued the insured gives full information as to his title, to the agent of the insurer, the latter cannot insist upon a forfeiture because the title is not such as is covenanted in the policy. *Home Ins. Co.* v. *Mendenhall*, 164 Ill. 458 (45 N. E. Rep. 1078; 36 L. R. A. 374). Knowledge of the insured's title by the agent of the insurer will

estop the latter to enforce a forfeiture on account of a defect in the title, although the policy provided that the insured's interest shall be unconditional and sole, and that no "representative of this company shall have power to waive any provision or condition of this policy, except such as by the terms of this policy may be endorsed hereon or added thereto." *Hartford Fire Ins. Co.* v. *Keating*, 86 Md. 130 (38 Atl. Rep. 29; 63 Am. St. Rep. 499). To the same effect is the case of *Trustees of St. Clara E. Acd.* v. *Northwestern Nat. Ins. Co.*, 98 Wis. 257 (73 N. W. Rep. 767). Where an insurance company has knowledge of all the facts in regard to the nonoccupancy of the insured property which has been destroyed, and after its destruction requests the owner to take the steps provided for by the policy for a settlement, the details of which are kept under consideration between them for more than four months, during which time no claim of forfeiture is made by the company, it will be held to have waived its right to make such claim. *Hanscom* v. *Home Ins. Co.*, 90 Me. 333 (38 Atl. Rep. 324). Where one accepted from an insurance company a policy of insurance without knowing that it contained a condition requiring him to be the sole owner of the property, which policy was issued by a solicitor of the company not having sufficient knowledge of the English language to make a proper report of the true condition of the insured's title it is held that the company cannot enforce a forfeiture on account of the insured's title not conforming strictly to the conditions of the policy. *Miotke* v. *Milwankee Mechanics' Ins. Co.*, 113 Mich. 166 (71 N. W. Rep. 468).

Sec. 433. Husband's right to recover for loss of property in which his wife has equal interest. A husband to whom a policy is issued, is entitled to recover the entire damages accruing to whatever interests are covered by the policy, although his wife has an equal interest with himself in the property insured. *Miotke* v. *Milwaukee Mechanics' Ins. Co.*, 113 Mich. 166 (71 N.W. Rep. 468). The court say: "In *Insurance Co.* v. *Barracliff*, 45 N. J. L. 543, it was determined that 'a husband, in possession and enjoyment with his wife of her real and personal property, with an inchoate right

of curtsey, has an insurable interest in both, and, when the intention was evinced to insure the whole ownership, may recover the whole loss.' This case contains an interesting discussion of the subject, and asserts the doctrine that the amount to be recovered will depend, not on the loss happening to the individual interest of the assured, but on the damage accruing to whatever interests are covered by the policy, so far as the assured represents those interests, whether as his own or by the precedent authority or subsequent ratification of others. See *Waring* v. *Insurance Co.*, 45 N. Y. 606 (6 Am. Rep. 146)."

Sec. 434. Recovery in case of total loss—What is a "total loss." Mo. Rev. Stat. 1889, § 5897, requiring full payment of insurance in case of total loss, it is held that there is a "total loss" where a building by reason of fire has lost its identity and specific character as a building and becomes so far disintegrated that it cannot be properly designated as a building although some part of it may remain standing and can be safely used in rebuilding. *O'Keefe* v. *Liverpool & L. & G. Ins. Co.*, 140 Mo. 558 (41 S. W. Rep. 922; 39 L. R. A. 819). Citing, *Lindner* v. *Insurance Co.*, 98 Wis. 526 (67 N. W. Rep. 1125); *Seyk* v. *Insurance Co.*, 74 Wis. 72 (41 N W. Rep. 445; 8 L. R. A. 523); *Oshkosh Packing & Provision Co.* v. *Mercantile Ins. Co.*, 31 Fed. Rep. 200; *Insurance Co.* v. *Bachler*, 44 Neb. 549 (62 N. W. Rep. 911); *Insurance Co.* v. *Garlington*, 66 Tex. 103 (18 S. W. Rep. 337); *Huck* v. *Insurance Co.*, 127 Mass. 306 (34 Am. Rep. 373); *Williams* v. *Insurance Co.*, 54 Cal. 450; *Corbett* v. *Insurance Co.*, 85 Hun. 250 (32 N. Y. Supp. 1059); *Insurance Co.* v. *Eddy*, 36 Neb. 461 (54 N. W. Rep. 856; 19 L. R. A. 707). In Arkansas, a policy upon real property, in case of total loss, becomes a liquidated demand against the insurance for its face or the amount on which premiums are paid. Laws 1899, p. 112. Substantially the same is provided by statute in Florida and Washington. Florida Laws 1899, p. 33; Wash. Laws. 1899, p. 333.

IRRIGATION.

EPITOME OF CASES.

Sec. 435. Appropriation — What constitutes — Abandonment. One who files a notice of appropriation of water but delays for many years to construct any ditch or make any diversion, has no rights as against one in the actual and peaceable possession and enjoyment of the water. *Cardoza* v. *Calkins*, 117 Cal. 106 (48 Pac. Rep. 1010). An appropriator of water does not enlarge his rights by merely filing a notice whereby he claims an appropriation of a certain amount of the water of the stream, where he makes no additional or other use of the water than he had made prior to the date of such notice. *Smyth* v. *Neal*, 31 Or. 105 (49 Pac. Rep. 850). A water right may be acquired in Montana by the actual diversion and appropriation of the water of a stream, without complying with the statute (Comp. Stat. 1887, div. 5, ch. 74) requiring a locator to post and file a notice of his appropriation, which will be good as against all subsequent appropriators. *Murray* v. *Tingley*, 20 Mont. 260 (50 Pac. Rep. 723). In the absence of an intention to that effect, mere nonuser of a water right does not constitute an abandonment. *Sloan* v. *Glancy*, 19 Mont. 70 (47 Pac. Rep. 334). Water rights appurtenant to the lands of a decedent are not abandoned by the failure of his administrator to use them during one irrigating season. *Turner* v. *Cole*, 31 Or. 154 (49 Pac. Rep. 971).

Sec. 436. Rights of appropriators of water—Priorities. An appropriator of a water right is entitled to such quantity as he can put to a useful purpose upon his land within a reasonable time by the use of reasonable diligence, but his right to appropriate a sufficient quantity to irrigate all his land may be lost by unreasonable delay. *Senior* v. *Anderson*, 115 Cal. 496 (47 Pac. Rep. 454). Particular facts held

insufficient to show a lack of diligence by a prior appropriator in the application of the waters taken to a useful purpose. *Arnold* v. *Passavant*, 19 Mont. 575 (49 Pac. Rep. 400). In case of conflict between appropriators of water in a given stream, that appropriation that is first in time is the first in right. *Dunniway* v. *Lawson*, Idaho (51 Pac. Rep. 1032). Citing and approving, *Hillman* v. *Hardwick*, 2 Idaho 983 (28 Pac. Rep. 438). Where a stream is fed by the waters of a spring, either through definite channels or by percolation, a prior appropriator may enjoin the owner of the spring from diverting its waters to his own use. *Bruening* v. *Dorr*, 23 Colo. 195 (47 Pac. Rep. 290; 35 L. R. A. 640). Citing, *Strait* v. *Brown*, 16 Nev. 317 (40 Am. Rep. 497). The right of one to take a certain portion of the waters of a stream is not affected by his changing the place of his diversion, where such change does not injuriously affect the rights of others. *Smith* v. *Corbit*, 116 Cal. 587 (48 Pac. Rep. 725); *San Luis Water Co.* v. *Estrada*, 117 Cal. 168 (48 Pac. Rep. 1075). The priority of the appropriation of one who has given a proper notice and constructed his ditch, is not affected by the fact that his ditch broke before the water reached the land intended to be irrigated, by reason of which one claiming an adverse appropriation was enabled to first apply the water on his land. *Wells* v. *Kreyenhagen*, 117 Cal. 329 (49 Pac. Rep. 128). The right to water by prior appropriation is limited in every case in quantity and quality by the uses for which the appropriation is made. A different use of the water subsequently does not affect the right. That is subject to the same limitations, whatever the use. The appropriation does not confer such an absolute right to the body of the water diverted that the owner can allow it, after its diversion, to run to waste, and prevent others from using it for mining or other legitimate purposes. *Senior* v. *Anderson*, 115 Cal. 496 (47 Pac. Rep. 454). The waters of a prior appropriator are fixed by the extent of his appropriation for a beneficial use, and others may subsequently appropriate any water of a stream not so used by a prior appropriator; and such latter appropriation becomes a vested right, and entitled to as much protection as the former, and a right of which he cannot be deprived except by voluntary alienation, or for-

feiture by abandonment. The rights of the former being fixed, he cannot enlarge his rights to the detriment of the latter by increasing his demands, or by extending his use to other lands, even if used for a beneficial purpose. *Becker* v. *Marble Creek Irr. Co.*, 15 Utah 225 (49 Pac. Rep. 892). The test of the extent of an appropriation with reference to a subsequent right to the waters of a stream is dependent upon the capacity of the first ditch before such subsequent appropriation is made. When an owner or possessor of land makes an appropriation of water in excess of the needs of the particular portion of the land upon which he conveys the water, and other portions of his land also require irrigation, his water right is not limited by the requirements of the particular fraction. He may still, despite the fact that another's water right has attached, construct other ditches through his remaining land, provided that the total amount of water conveyed by all the ditches on his place does not exceed the original capacity of the first ditch. As between his appropriation and the subsequent water right, the capacity of the ditch by means of which he first made his appropriation is the test of the extent of it. *McDonald* v. *Lannen*, 19 Mont. 78 (47 Pac. Rep. 648). For particular case determining the rights of appropriators of water, see *Senior* v. *Anderson*, 115 Cal. 496 (47 Pac. Rep. 454).

Sec. 437. Priority of right to take water for domestic use. The right of a riparian owner to use the water of a stream for irrigation, is subject to the prior right of other owners to so much of the water as is necessary for domestic purposes. *Smith* v. *Corbit*, 116 Cal. 587 (48 Pac. Rep. 725). The preference given by Colo. Const., Art. 16, § 6, for the use of water for domestic purposes, does not authorize a ditch company to divert water for domestic use from the public streams of the state by means of large canals, in violation of prior vested rights of others to use the water for other purposes. *Montrose Canal Co.* v. *Loutsenhizer Ditch Co.*, 23 Colo. 233 (48 Pac. Rep. 532). The court say: "While it is true that § 6 of article 16 of the constitution recognizes a preference in those using water for domestic purposes over those using it for any other purpose, it is not intended thereby to

authorize a diversion of water for domestic use from the public streams of the state by means of large canals, as attempted in this case. The use protected by the constitution is such as the riparian owner has at common law to take water for himself, his family or his stock, and the like. And, if the term 'domestic use' is to be given a different or greater meaning than this, then, as between such enlarged use and those having prior rights for agricultural and manufacturing purposes, it is subject to that other constitutional provision, requiring just compensation to those whose rights are affected thereby. *Strickler* v. *City of Colorado Springs*, 16 Colo. 61 (26 Pac. Rep. 818; 25 Am. St. Rep. 245); *Armstrong* v. *Larimer Co. Ditch Co.*, 1 Colo. App. 49 (27 Pac. Rep. 285). In the Strickler Case, this court, in construing the constitutional provision referred to, as applied to water rights antedating its adoption, said: 'Our conclusion, therefore, is that the constitutional provisions relied upon were not intended to affect, and do not affect, prior vested rights, but that all owners of such rights are entitled to compensation therefor before the same can be taken or injuriously affected.' We think the doctrine of that decision is equally applicable to the rights of prior appropriators for manufacturing or agricultural purposes acquired since the adoption of the constitution. To give the phrase 'domestic use' the construction contended for by appellants would result in laying waste many valuable agricultural lands, and destroying manufacturing rights to the use of water, to the end that the same may be diverted for domestic use by communities settling at points remote from the water supply, although the water could only be taken to such distant points by long irrigating canals. This would require the diversion of many times the volume of water actually required for domestic use, as by far the greater portion of it would be lost as the result of evaporation and seepage."

Sec. 438. Conveyance of water rights. Water rights pass by a conveyance of land to which they are appurtenant, *Sloan* v. *Glancy*, 19 Mont. 70 (47 Pac. Rep. 834); although the grantor is ignorant of their existence and they are not mentioned in the conveyance. *Turner* v. *Cole*, 31 Or. 154 (49 Pac. Rep. 971). Possessory rights to ditches

and to the use of water may each have an existence independent of the other. A ditch may be conveyed reserving the water right, or the water right may be conveyed reserving the ditch. *Ada Co. Farmers' Irr. Co.* v. *Farmers' Canal Co.*, Idaho (51 Pac. Rep. 990; 40 L. R. A. 485). Where a conveyance of an interest in an irrigation ditch makes no mention of lateral ditches, it is not error to admit evidence to show that it is not the intention to include them. *Carman* v. *Staudaher*, 20 Mont. 364 (51 Pac. Rep. 788). Where the owner of land on which there is a natural stream conveys a portion of the land, he impliedly grants a right to such use of water as is necessary for the reasonable enjoyment of the part granted; and where his grantee uses half of the water of such stream continuously for 19 years without objection from the grantor or his subsequent grantees of the remaining part of the land such grantee acquires a right to take and use one-half of the water of the stream. *Smith* v. *Corbit*, 116 Cal. 587 (48 Pac. Rep. 725). A verbal transfer by a settler on the public domain of his possession of the claim and the improvements passes to his transferee appurtenant water rights and the priority incident thereto. *McDonald* v. *Lannen*, 19 Mont. 78 (47 Pac. Rep. 648).

Sec. 439. Construction of statutes. Cal. Pol. Code, §§ 3446, 3481; Stat. 1878, p. 911, construed and applied—organization of reclamation districts—dissolution—constitutionality of statute. *People* v. *Reclamation Dist. No. 551*, 117 Cal. 114 (48 Pac. Rep. 1016). California Laws 1887, ch. 34, §§ 12, 15, 22, 37, construed and applied—irrigation districts—sale of bonds—application of proceeds—power of board of directors to levy assessments. *Hughson* v. *Crane*, 115 Cal. 404 (47 Pac. Rep. 120). Cal. Act, Mar. 7, 1887 (Stat. 1887, p. 29); Stat. 1889, p. 212; Stat. 1891, p. 143, construed and applied—"Wright Act" and statutes supplementary and amendatory—validity of organization of irrigation district and issue of bonds thereby. *In re Central Irr. Dist.*, 117 Cal. 382 (49 Pac. Rep. 354). A statute (Colo. Gen. Stat., § 1722) providing for the prorating of the waters of an irrigation ditch in the case of scarcity, will not be applied so as to interfere with existing priorities or invalidate contracts for the prorat-

ing existing between the parties interested. *Larimer & Weld Irr. Co.* v. *Wyatt*, 28 Colo. 480 (48 Pac. Rep. 528). Under Mont. Const., art. 3, § 15, the act of March 6, 1891, authorizing the condemnation of a right of way for a ditch to convey water to irrigate land or work a mine, though owned by a single individual, is constitutional. *Ellinghouse* v. *Taylor*, 19 Mont. 462 (48 Pac. Rep. 757). Wash. Laws 1873, p. 520, regulating irrigation and water rights in the county of Yakima, Washington territory, does not abrogate existing common law riparian rights. *Benton* v. *Johncox*, 17 Wash. 277 (49 Pac. Rep. 495; 61 Am. St. Rep. 912; 39 L. R. A. 107). Wyoming Laws 1890–1891, ch. 8, §§ 27–30—decision of state board of control as to amount and priority of water appropriations—appeal—notice. *Daley* v. *Anderson*, Wyo. (48 Pac. Rep. 889). Mont. Comp. Stat. 1887, div. 5, ch. 74; Civ. Code 1895, § 1888, construed and applied—posting and filing notice of location. *Murray* v. *Tingley*, 20 Mont. 260 (50 Pac. Rep. 728).

Sec. 440. Actions and adjudications concerning water rights—Statutes construed. A water company may litigate its water rights for the benefit of its stockholders and consumers without joining them as parties. *Montrose Canal Co.* v. *Loutsenhizer Ditch Co.*, 23 Colo. 233 (48 Pac. Rep. 532). In an action for the diversion of water, as against one showing no better right, it is sufficient proof of title for plaintiff to show that he was in the actual and peaceable enjoyment and possession of the waters at the date of defendant's diversion. *Cardoza* v. *Calkins*, 117 Cal. 106 (48 Pac. Rep. 1010). In an action by a lower appropriator to quiet his title to the waters of a stream, as against an upper appropriator and riparian owner, it is held that an answer pleading a prior appropriation, but which fails to allege that the defendant is entitled as a riparian owner to any definite quantity of water, or what proportion of the waters of the stream he could reasonably exhaust for that purpose is insufficient to raise an issue as to the extent of defendant's right as a mere riparian proprietor. *San Luis Water Co* v. *Estrada*, 117 Cal. 168 (48 Pac. Rep. 1075). For cases determining particular questions of pleading and evidence, see *Arnold* v. *Passavant*, 19 Mont. 575 (49 Pac. Rep. 400); *Water-supply & Storage Co.* v. *Tenney*, 24

Colo. 344 (51 Pac. Rep. 505). Particular findings and decree in an action to determine water rights held to be so uncertain as to require modification. *Nephi Irrigation Co.* v. *Vickers*, 15 Utah 374 (49 Pac. Rep. 301). Cal. Stat. 1887, p. 35, § 14, construed and applied—power of irrigation district to maintain and defend actions. *Boehmer* v. *Big Rock Creek Irr. Dist.*, 117 Cal. 19 (48 Pac. Rep. 908). Mills' Ann. Colo. Stat., § 2434, does not authorize parties whose water rights have been previously adjudicated to relocate the waters involved in such decree. *Montrose Canal Co.* v. *Loutsenhizer Ditch Co.*, 23 Colo. 233 (48 Pac. Rep. 532). Mills' Ann. Colo. Stat., § 2403, construed and applied—proceedings to determine priorities of water rights—construction of decree. *Water-Supply & Storage Co.* v. *Larimer & Weld Irr. Co.*, 24 Colo. 322 (51 Pac. Rep. 496). For construction of particular decree as to the right to use reservoirs, see *Water-Supply & Storage Co.* v. *Tenney*, 24 Colo. 344 (51 Pac. Rep. 505), construing and applying Mills' Ann. Colo Stat., § 2270. Mont. Comp. Stat. 1887, div. 5, ch. 74, § 1260, construed and applied —power of court to determine all rights in one decree—allowing amendments. *Murray* v. *Tingley*, 20 Mont. 260 (50 Pac. Rep. 723).

Sec. 441. Miscellaneous notes. Adverse possession of a water right does not begin unless there has been an actual use of the water. *Senior* v. *Anderson*, 115 Cal. 496 (47 Pac. Rep. 454). Where there is a conflict between the interests of navigation and agriculture in relation to a stream, the use of which for navigation would be difficult and impracticable, the right to use it for irrigation will prevail, where to deny such right would destroy large agricultural interests. *United States* v. *Rio Grande Dam & Irr. Co.*, N. M. (51 Pac. Rep. 674). The owner of an irrigating ditch is liable for damages caused by seepage and leakage through its banks, and the doctrine of contributory negligence does not apply where such owner has knowledge of the defects in his ditch and could have prevented the injury. *Shields* v. *Orr Extension Ditch Co.*, 23 Nev. 349 (47 Pac. Rep. 194). Citing, *McCarty* v. *Canal Co.*, 2 Idaho 225 (10 Pac. Rep. 623); *Richardson* v. *Kier*, 34 Cal. 63 (91 Am. Rep. 681).

Sec. 442. Statutes amended and new statutes. Colorado Laws 1899, p. 285, provides for special proceedings by "any person desirous of changing the point of diversion of his right to use water from any of the streams" of the state, and authorizes the exchange or loan of a water right. Idaho Laws 1899, p. 369, amends Act Mar. 6, 1897, concerning the distribution of waters where the same have been alloted by decree of court, and enlarges the powers and duties of water-masters. Idaho Laws 1899, p. 280, provides for the appropriation and distribution of water; the condemnation of lands for canals, ditches and conduits, and empowers the boards of county commissioners to establish a maximum rate for the use of water. Idaho Laws 1899, p. 405, amends Rev. Stat., §§ 935, 968, concerning the building and maintaining of bridges across irrigation canals or ditches crossing highways. Idaho Laws 1899, pp. 408–428, is a new and comprehensive statute providing for the organization and government of irrigation districts and for their acquisition of water and other property and for the distribution of water thereby for irrigation purposes. Kan. Laws 1898 p. 316, provides for the condemnation of lands for the storage of water, by any irrigation, canal or reservoir company. Mont. Laws 1899, pp. 52, 53, amend Pol. Code, part 3, tit. 8, art. 2, creating the State Arid Land Grant Commission and defining its powers and duties, by adding §§ 3533a, 3536a, 3546a. Mont. Laws 1899, p. 136, "authorizes the appointment of a commissioner for the measurement and division of water under decrees of courts in certain cases." Nev. Laws 1899, p. 51, amends act approved Mar. 23, 1891, providing for organization and government of irrigation and water storage districts, the acquistion of water and property thereby and for the distribution of water for irrigation purposes. Nev. Laws 1899, p. 64, provides for turning water stored for irrigation or other beneficial purposes into the channel of any stream and for reclaiming the same. Nev. Laws 1899, p. 81, authorizes Washoe county to purchase reservoir sites for the storage of water. Nev. Laws 1899, pp. 115–119, is an "act to define and preserve existing water rights, provide for the storage of surplus water, and regulate the mode of using and acquiring the use of water in the future." Wash. Laws 1899, pp. 164-168, provides for the dissolution of irrigation districts and the

liquidation of their indebtedness. Wash. Laws 1899, p. 261, provides proceedings for the condemnation of a right of way for irrigating ditches, canals, and flumes for agricultural and mining purposes.

JUDICIAL SALES.

EPITOME OF CASES.

Sec. 443. Who may make—Adjournment. In Nebraska the district court has power to appoint a person, other than the sheriff of the county, special master, to make a sale of real estate ordered to be sold in pursuance of its decree. As a special master is not an officer within the meaning of Neb. Comp. Stat. 1895, ch. 10, § 1, there is no statute requiring him to take and file an oath or to give a bond; but the court may and should require this of him. *Omaha Loan & T. Co.* v. *Bertrand*, 51 Neb. 508 (70 N. W. Rep. 1120). Where a sale was opened at the time and place designated in the statutory notice, it is not rendered invalid by an adjournment of it to a building about 600 feet distant, rendered necessary by the inclemency of the weather, all persons in attendance going to such building where the sale was completed. *Morrissey* v. *Dean*, 97 Wis. 302 (72 N. W. Rep. 873). Citing, *Longworthy* v. *Featherston*, 65 Ga. 165; *Patterson* v. *Reynolds*, 19 Ind. 148.

Sec. 444. Sale in parcels or in solido. In Arkansas it is held that objections to a sale on account of failure to sell in forty-acre tracts, or failure to give the proper notice, or fraudulent conduct between the parties making the sale, must be made before confirmation, where the facts are known or accessible to the party in time to make the objections. *Waldo* v. *Thweatt*, 64 Ark. 126 (40 S. W. Rep. 782). Where a sheriff is commanded by an order of sale to sell disconnected tracts of land, it is his duty to offer and sell them separately, unless there be some valid reason for doing differently; but where no request is made by the debtor to have the lands offered in separate parcels, and where the order of sale directs that all

of the parcels be sold subject to a prior mortgage covering them all, a sale of the whole property *en masse* should be confirmed. *Geuda Springs Town & Water Co.* v. *Lombard*, 57 Kan. 625 (47 Pac. Rep. 582).

Sec. 445. Confirmation. A judicial sale is not complete or conclusive until the decree of confirmation. *Thompson* v. *Cox*, 42 W. Va. 566 (26 S. E. Rep. 189). Upon appeal, objections to the confirmation of a sale which were not presented to the court below, will not be considered. *Nebraska Land Stock-Growing & Inv. Co.* v. *McKinley-Lanning Loan & T. Co.*, 51 Neb. 647 (71 N. W. Rep. 312). Confirmation of a sale made upon terms different from those prescribed in the decree, cures the irregularity. *Robertson* v. *Smith*, 94 Va. 250 (26 S. E. Rep. 579; 64 Am. St. Rep. 728). Neb. Code Civ. Proc., § 498, applied—sufficiency of order of confirmation. *Nebraska Land Stock-Growing & Inv. Co.* v. *McKinley-Lanning Loan & T. Co.*, 51 Neb. 647 (71 N. W. Rep. 312).

Sec. 446. Title and rights of purchaser. Where a decree of confirmation stipulates that title is to be vested in the purchaser "upon payment of the purchase money," he does not acquire any title until he complies with this condition. *Blair* v. *Blair*, Tenn. (41 S. W. Rep. 1078). Trees growing on the land at the time of its seizure which are cut down by a trespasser pending the same, are not to be classed as "fruits" or "revenues" of the land, and if they are still upon the land at the time of the judicial sale thereof, not having been specially withdrawn from falling under the operation of the sale nor made the subject of a special, separate adjudication, they pass to the purchaser of the land as a part of the purchase. *Frank* v. *Magee*, 49 La. 1250 (22 So. Rep. 739). The title of the purchaser, where there is an appeal from the order of confirmation, relates back on affirmance at least as far as that order, and he may not deduct from the amount of his bid sums which he has paid on account of taxes becoming liens on the property, and interest accruing on a senior mortgage subject to which he bought, between the time of confirmation and the time of affirmance or dismissal of

appeal. *Clark & Leonard Inv. Co.* v. *Way*, 52 Neb. 204 (71 N. W. Rep. 1021). Purchasers at judicial sales must take notice of the terms of the decree. Where that and an order of sale issued in pursuance thereof differ, the decree governs, and it will not be presumed that bidders are misled or prevented from bidding by the variance. *McKinley-Lanning Loan & T. Co.* v. *Hamer*, 52 Neb. 709 (72 N. W. Rep. 1042). While a court may grant equitable relief in those cases where a purchaser has been deceived by the action of the court or the misrepresentation of its agents as to the amount of land sold, it is held that a purchaser is not entitled, as a matter of right, after confirmation of the sale to elect to stand by it and have credit for the deficiency in the quantity of the land purchased, where other parties in interest are asking a rescission on equitable principles. *Trigg* v. *Jones' Adm'r*, Ky. (42 S. W. Rep. 848). A bidder at a judicial sale, whose bid has been accepted, may appeal from an order setting the sale aside. *Penn Mut. Life Ins. Co.* v. *Creighton Theater Bldg. Co.*, 51 Neb. 659 (71 N. W. Rep. 279).

Sec. 447. Liability of purchaser. A court of equity has power to make and enforce an order requiring a purchaser of property at a sale by its master, to pay the amount of his bid into court, but before making such order the court must confirm the sale. *Allred* v. *McGahagan*, 39 Fla. 118 (21 So. Rep. 802). Where one who bids off land as an attorney refuses to disclose his principal, he is personally liable for the amount of his bid. *Long* v. *McKissick*, 50 S. C. 218 (27 S. E. Rep. 636). Where a sale was made at a certain price per acre and on account of a miscalculation of the officer, he failed to collect the full amount due from the purchaser for the number of acres conveyed, the parties who owned the land may recover the unpaid price from such purchaser. *Davies* v. *Gibbs*, 168 Ill. 205 (48 N. E. Rep. 120). Where the report of sale for confirmation shows title to be in third persons, the purchaser cannot be made liable on his bid until the outstanding title has been adjudicated. *Bird* v. *Smith*, Ky. (40 S.W. Rep. 571). The mere fact that there is a deficiency in the number of acres contained in the land sold, is no defense to an action against a purchaser for the amount of his bid. *Long*

v. *McKissick*, 50 S. C. 218 (27 S. E. Rep. 636). A purchaser at a judicial sale, who instead of paying the amount of his bid to the officer making the sale, undertakes to disburse it in discharging liens, does so at his peril. *Clark & Leonard Inv. Co.* v. *Way*, 52 Neb. 204 (71 N. W. Rep. 1021).

Sec. 448. Refusal to complete purchase—Purchaser's rights and liabilities. A purchaser at a foreclosure sale, who before paying the price or entering into possession discovers illegalities in the proceedings which have led to the sale, calculated to throw a cloud upon his title, may refuse to execute the purchase. *Succession of Nash*, 48 La. 1573 (21 S. E. Rep. 254). A purchaser who fails to complete his purchase or to comply with the terms of sale may be proceeded against by rule and compelled to do so. *Robertson* v. *Smith*, 94 Va. 250 (26 S. E. Rep. 579; 64 Am. St. Rep. 723). A purchaser is not liable for failure to complete his purchase, where he was misled as to the identity of the property upon which he was bidding by false representations of the person conducting the sale. *Clay* v. *Kagelmacher*, 98 Ga. 149 (26 S. E. Rep. 493). A purchaser at an auction sale made by a receiver under an order of court, of lands advertised as "subject to a mortgage of $1,600.00 to be at five per cent., three years to run," cannot refuse to perform his purchase because the mortgage contains a gold clause which was not disclosed to the public at the time of the sale. Bartlett and Haight, JJ., dissenting. *Blanck* v. *Sadlier*, 153 N. Y. 551 (47 N. E. Rep. 920; 40 L. R. A. 666). Where property is bid off for a certain sum under an agreement between the owner and the purchaser that he is to pay an additional sum before the expiration of the period for redemption, an assignee of such purchaser takes subject to such agreement, although he has no notice of it, and if the agreement is not performed a court of equity may order a resale upon refundment of the original purchase price to the party entitled to it. *Bruschke* v. *Wright*, 166 Ill. 183 (46 N. E. Rep. 813; 57 Am. St. Rep. 125).

Sec. 449. Purchaser's right to writ of assistance. A purchaser under a judicial sale is not entitled to a writ of

assistance unless he can show a valid judgment. *Vermont Loan & T. Co.* v. *McGregor*, Idaho (51 Pac. Rep. 104). One not a party to a decree under which a sale was made, cannot be dispossessed by a writ of possession issued to a purchaser thereat, without opportunity to be heard as to his title, although he claims as a purchaser from the defendant in the decree. *Wright* v. *Carr*, Ky. (41 S. W. Rep. 23). A purchaser's application for a writ of assistance to obtain possession should be dismissed where it appears from the pleadings filed that there will be a contest as to his title having been fully determined. *Roach* v. *Clark*, 150 Ind. 93 (48 N. E. Rep. 796; 65 Am. St. Rep. 353). The court say: "The application for the writ of assistance could never have been recognized to supply a remedy to quiet title concurrent with the statutory remedy. It was designed rather as a summary remedy for the enforcement of a right already determined by a court of equity, and which determination one of the parties refuses to recognize, and the other may enforce without resort to a new suit or action. But, when the rights of the parties have not been so determined, as to render further litigation necessary, the application for the writ may not be the basis of such further litigation. The necessity appearing upon the application for the writ, the court will deny the writ, and the parties will be left to the forum having jurisdiction of the question unsettled. * * * * It is certainly not customary to issue the writ where there is a *bona fide* contest as to the right to the possession under the sale, or where the rights of the respective parties have not been fully adjudicated in the principal suit. 2 Enc. Pl. & Prac. 980; *Vanmeter* v. *Borden*, 25 N. J. Eq. 414; *Schenck* v. *Conover*, 13 N. J. Eq. 220 (78 Am. Dec. 95); *Hooper* v. *Yonge*, 69 Ala. 484; *Blauvelt* v. *Smith*, 22 N. J. Eq. 32; *Thomas* v. *De Baum*, 14 N. J. Eq. 37; *Wiley* v. *Carlisle*, 93 Ala. 238 (9 So. Rep. 288); *Barton* v. *Beatty*, 28 N. J. Eq. 412; *Knight* v. *Houghtalling*, 94 N. C. 411; *Frazier's Adm'r* v. *Beatty*, 25 N. J. Eq. 343; *Stanley* v. *Sullivan*, 71 Wis. 585 (37 N. W. Rep. 801; 5 Am. St. Rep. 245); *Ramsdell* v. *Maxwell*, 32 Mich. 285; *Flowers* v. *Brown*, 21 Ill. 270; *Hayward* v. *Kinney*, 84 Mich. 591 (48 N. W. Rep. 170)."

Sec. 450. Setting aside sales—Fraud and irregularities. One seeking to set aside a sale on the ground that competition in bidding on the property sold was prevented and defeated through fraud and collusion on the part of the purchaser and his attorney, imposes upon himself the burden of making that charge clear by a fair preponderance of evidence. *Schlater* v. *Brusle*, 49 La. 1704 (22 So. Rep. 925). The fact that a sale advertised for 10 o'clock A. M., occurred at about half past 10 o'clock is not sufficient ground for setting it aside. *Lothrop* v. *Tracy*, 24 Colo. 382 (51 Pac. Rep. 486; 65 Am. St. Rep. 229). Citing, *McGovern* v. *Insurance Co.*, 109 Ill. 151; *Lester* v. *Bank*, 17 R. I. 88 (20 Atl. Rep. 231). The failure of an attachment affidavit to state that the debt or demand "is a just claim," as required by statute (Mill. & V. Tenn. Code, § 4210), will not render a sale of land thereon subject to a collateral attack, where the plaintiff had attached to his declaration an itemized account swore to as "true, just and correct." *McElwee* v. *Steelman*, Tenn. (38 S. W. Rep. 275). Where the sale is otherwise regular, its confirmation will not be set aside, because the purchaser voluntarily raised his bid in open court, without being required to do so or giving any reason for his action. *Griffith* v. *Jenkins*, 50 Neb. 719 (70 N. W. Rep. 256). The only persons who can complain on account of the deed being executed to the wrong person, are the persons who made the successful bids at the sale. *Davies* v. *Gibbs*, 168 Ill., 205 (48 N. E. Rep. 120).

Sec. 451. Setting aside sales—Inadequacy of price. Mere inadequacy of price alone is not sufficient cause for setting aside a sale. *Carson* v. *Ambrose*, 183 Pa. St. 88 (38 Atl. Rep. 508); *Lothrop* v. *Tracy*, 24 Colo. 382 (51 Pac. Rep. 486; 65 Am. St. Rep. 229); *Keith* v. *Browning*, 139 Mo. 190 (40 S. W. Rep. 764). While inadequacy of price will not warrant the setting aside of an execution sale for the reason that the opportunity to redeem affords the owner of the property full protection, yet, if he does not know of the sale, and is not chargeable with knowledge thereof until the time for redemption has expired, gross inadequacy of price, coupled with unconscionable conduct on the part of the judgment creditor,

will constitute a reason for annulling the sale when the judgment creditor buys the property at the sale, and the deed is executed and delivered to an assignee of the certificate of sale, who is not a *bona fide* purchaser, and who is cognizant of all the facts excusing the owner of the property from not knowing of the fact of sale in time to redeem. *Warren* v. *Stinson*, 6 N. Dak. 298 (70 N. W. Rep. 279). A trustee's sale under a decree of foreclosure, will not be set aside on account of inadequacy of price unless such inadequacy is so gross and inordinate as to indicate misconduct or want of judgment on the part of the trustee. *Hughes* v. *Riggs*, 84 Md. 502 (36 Atl. Rep. 269). A sale of property worth $2,500.00 for $400.00 may be set aside where it appears that all the parties supposed the property to be subject to a mortgage for $2,000.00, which was in fact discharged. *Stroup* v. *Raymond*, 188 Pa. St. 279 (38 Atl. Rep. 626; 63 Am. St. Rep. 758). The failure of property to bring its full value on account of a financial stringency, is not sufficient ground for setting aside a sale, where there is no evidence that the property would bring more if resold. *Lathrop* v. *Tracy*, 24 Colo. 382 (51 Pac. Rep. 486; 65 Am. St. Rep. 229). If property brings its market value at the time of the sale, the sale will not be set aside because, owing to a general depreciation in values, the price realized was not equal to its former value. *Lipscomb* v. *New York Life Ins. Co.*, 138 Mo. 17 (39 S. W. Rep. 465). Persons who have an opportunity to attack a foreclosure sale on account of inadequacy of price at the time of its confirmation, cannot subsequently maintain an independent action to set aside the sale on that ground. *Phillips* v. *Love*, 57 Kan. 828 (48 Pac. Rep. 142).

Sec. 452. Guardians' sales—Practice. In Mississippi it is held that a guardian's sale which is not reported to, or confirmed by, the court ordering it, is void. *Hicks* v. *Blakeman*, 74 Miss. 459 (21 So. Rep. 7). A guardian's sale made upon the application of one assuming to act as guardian, who in fact has no authority as such, is an absolute nullity and is not cured by the provision of Neb. Comp. Stat., ch. 23, § 64, prohibiting collateral attacks upon such sales where certain facts appear. *Wells* v. *Steckleberg*, 50 Neb. 670 (70 N.

W. Rep. 242). In a subsequent opinion rendered upon a rehearing in this case, it is held that a person making such sale as a guardian is estopped, as against the purchaser, from asserting an estate in his own right in the same land. *Wells* v. *Steckelberg*, 52 Neb. 597 (72 N. W. Rep. 865; 66 Am. St. Rep. 529). A guardian's sale of real estate for more than $1,000 at private sale without notice, which under Ind. Rev. Stat. 1894, § 2697, should have been made at public sale with notice, will not be held void where the court ordering the sale, as made, had jurisdiction. *Eliason* v. *Bronnenburg*, 147 Ind. 248 (46 N. E. Rep. 582). W. Va. Code, ch. 83, construed and applied—guardians' sales—application of proceeds—bond of guardian. *Kester* v. *Hill*, 42 W. Va. 611 (26 S. E. Rep. 876).

Sec. 453. Guardians' sales—Liability of guardian's bondsmen. The liability for a guardian's failure to properly account for the proceeds of a sale rests upon his sureties on a special sale bond and not on the sureties upon his bond given at the time of his appointment. *Kestler* v. *Hill*, 42 W. Va. 611 (26 S. E. Rep. 876); *Findley* v. *Findley*, 42 W. Va. 372 (26 S. E. Rep. 433). In the last case the court say: "The general rule is that, where an officer is required to perform a duty special in nature, and give a special bond for its performance, no liability therefor attaches to his general bondsmen, in the absence of any declaration that they shall also be liable. *Board of Sup'rs* v. *Ehlers*, 45 Wis. 281. These principles will be found ably discussed and sustained in *Morrow* v. *Wood*, 56 Ala. 1, and Throop, Pub. Off., § 220. So, in *Board of Sup'rs* v. *Pabst*, 70 Wis. 852 (35 N. W. Rep. 337); *Board* v. *City of Paris*, 66 Tex. 119 (18 S. W. Rep. 342); *Com.* v. *Toms*, 45 Pa. St. 408; *Henderson* v. *Coover*, 4 Nev. 429."

Sec. 454. Miscellaneous notes. An objection that property, sold under a decree in equity, was appraised too low comes too late when made for the first time after the sale. *Omaha Loan & T. Co.* v. *Bertrand*, 51 Neb. 508 (70 N. W. Rep. 1120). A sale of land under a decree will pass title notwithstanding a misdescription in the judgment and com-

missioner's deed, where the land intended to be sold is manifest. *Hildebrand* v. *Bunnschu*, Ky. (40 S. W. Rep. 920). Particular evidence held sufficient to authorize the setting aside of a sheriff's sale on account of mutual mistake. *Howlett* v. *Central, Car. L. & Imp. Co.*, 50 S. C. 1 (27 S. E. Rep. 533).

Sec. 455. Statutes amended and new statutes. Mass. Pub. Stat., ch. 140, § 1—sales of real estate by guardian—amended, Laws 1899, p. 75. Mich. Comp. Laws 1897, § 9160—sales of real estate by guardian—amended, Laws 1899, p. 868. For general statute validating judicial sales in Montana, see Laws 1899, p. 145. New Jersey has a new statute prescribing the requisites of a notice of sale. Laws 1898, p. 585. And so has Ohio in reference to the description of property in the notice when the property to be sold is situated in any hamlet, village, town or city. Laws 1898, p. 256. In Virginia where a deed made in pursuance of a judicial sale shows on its face that such sale has been regularly made, it is *prima facie* evidence of that fact and that the other recitals in the conveyance are true. Laws 1897–98, p. 322. Wisconsin has a new statute prescribing special proceedings for the sale or other disposition of future contingent interests in lands. Laws 1899. pp. 525, 680.

LANDLORD AND TENANT.

EPITOME OF CASES.

Sec. 456. Right of landlord to injunction against occupancy of the premises by disreputable members of tenant's family. A tenant occupying premises near his landlord's residence, who marries a disreputable woman, cannot be enjoined by his landlord from bringing her to his house to live with him as his wife, where there is no evidence that she will continue her disreputable life. *Miles* v. *Lauraine*, 99 Ga. 402 (27 S. E. Rep. 739). The opinion of the court is as follows: "The ancient feudal system which prevailed in England in

earlier days has never existed in Georgia, and the right of the landlord to interfere with and control the domestic relations of his tenants has received no recognition by the laws of this state. The relation of landlord and tenant rests upon contract, and, in the absence of an express stipulation to the contrary, we can find no warrant in the law for the proposition that a landlord may lawfully exclude from the domicile of the tenant the wife of the latter, who may be, for any reason, distasteful to him. If the tenant should introduce into his premises disreputable or disorderly characters, such as would tend to convert an ordinarily respectable tenement into a bawdy house, or one frequented by disorderly persons and others of ill fame, such use of the premises by the tenant might well be enjoined as not within the contemplation of the parties at the time the contract under which he entered was executed; but we find nothing in the record in the present case to justify the application of such a doctrine. The person whose introduction into the house in question was objected to by the landlord was the lawful wife of the tenant. It is true, from the record, that she had not theretofore led a blameless private life. Upon the contrary, she had been guilty of indiscretions. She had, however, expressed a determination to change her method of living. She had become the lawful wife of a respectable man. He gave her the opportunity to demonstrate her willingness to lead a virtuous life, and, in the absence of a stipulation that this particular person should not be admitted into the tenement, she was entitled to have the opportunity of vindicating her claims to future respectability. We find in this record no evidence of a breach of any legal or moral duty due from the tenant to the landlord, and in the absence thereof there was no authority for his exclusion from the enjoyment, in such manner as he saw proper, of the premises in dispute. Sensitive persons, who would shield themselves from contact with disagreeable neighbors, should either move out or protect themselves by covenant."

Sec. 457. Estoppel to deny title. As against a landlord's claim for rent, his tenant is estopped to show that the property belonged to another, *Hamer* v. *McCall*, 121 N. C. 196 (28 S. E. Rep. 297); or that the lease was void, *Cher-*

okee Strip Live-Stock Ass'n v. *Cass Land & C. Co.*, 138 Mo. 394 (40 S. W. Rep. 107). A purchaser of a tenant's leasehold interest at a judicial sale thereof, is estoped to deny the lessor's title. *Hentig* v. *Pipher*, 58 Kan. 788 (51 Pac. Rep. 229). A tenant is estopped from denying his landlord's title, in so far as the right to the use and possession of the premises is concerned, although the title under which the latter first acquired possession and control thereof has reverted to the United States, and both the landlord and tenant are claimants for said property, and applicants and contestants for title thereto under and by virtue of the laws regulating the disposal thereof. *Young* v. *Severy*, 5 Okla. 630 (49 Pac. Rep. 1024). The lessee cannot deny his landlord's title on account of the fact that the lease is in violation of the Laws of Choctaw Nation, 1887, act October 28, requiring all noncitizens of the nation owning houses for the purpose of renting them to dispose of the same within sixty days. *G. W. Walker Trading Co.* v. *Grady Trading Co.*, Ind. Ter. (39 S. W. Rep. 854).

The rule does not apply where the lease is void on account of being prohibited by the statute. *Mayes* v. *Cherokee Strip Live-Stock Ass'n*, 58 Kan. 712 (51 Pac. Rep. 215). The estoppel does not continue after the eviction of a tenant by his landlord. *Evans' Adm'r* v. *Lytle*, Ky. (42 S. W. Rep. 1110). A married woman is not estopped to deny the title of her husband's lessor. *Shew* v. *Call*, 119 N. C. 440 (26 S. E. Rep. 33; 56 Am. St. Rep. 678). Minnesota has prescribed the law of estoppel between landlord and tenant in that state by a new statute which provides: "Whenever any person enters into the possession of any lands or tenements in this state, under or pursuant to a lawful lease thereof, he shall not be permitted, while so in possession, to dispute or deny the title of his landlord in any action brought by such landlord, or any one claiming under or through him to recover possession of any such lands or tenements. But such estoppel shall not apply to any lessee who at and prior to the time of accepting such lease, is already in possession of the leased lands or tenements under any claim or title adverse or hostile to that of such lessor." Laws 1899, p. 9.

Sec. 458. Forfeiture. A forfeiture cannot be enforced on account of the breach of an implied covenant in the lease. *Harris* v. *Ohio Oil Co.*, 57 O. St. 118 (48 N. E. Rep. 502). A forfeiture of a lease will not be decreed on account of a trivial breach of a covenant therein; nor will the forfeiture of a lease for eighteen years be enforced on account of the lessee's delay for two and one-half months to make improvements which he covenanted to make, where it appears that he has been making the preliminary negotiations and contract for doing the work required of him and his delay has not been willful or in bad faith. *Lundin* v. *Schoeffel*, 167 Mass. 465 (45 N. E. Rep. 933). The right of a lessor to enforce a forfeiture on account of the non-payment of rent, is not waived by the fact that he has previously brought summary proceedings for possession of the premises in which he has been awarded a judgment and the lessee has appealed, giving bond to secure the payment of rent during the pendency of the appeal. Wis. Rev. St., § 3368, applied. *Palmer* v. *City Livery Co.*, 98 Wis. 33 (78 N. W. Rep. 559).

Sec. 459. Tenancy at will—Tenancy at sufferance—Termination. Where an oral lease by a life tenant for the full period of his estate which is void on account of the statute of frauds, fixes no definite term of occupancy, nor makes any reservation of annual rent, or rent payable at stated intervals, it is held to create a tenancy at will. *Barrett* v. *Cox*, 112 Mich. 220 (70 N. W. Rep. 446). The common law rule that a tenancy at will is terminated by an alienation in fee or for years of the premises by the landlord, is not affected by Me. Rev. Stat. ch., 94, § 2, providing that "all tenancies at will may be terminated by either party by thirty days' notice in writing for that purpose given to either party, and not otherwise save by mutual consent," it being held that the word "party" is to be understood as "party to the contract," and the words "and not otherwise" refer rather to the acts of the parties to the tenancy than to the effects of their acts by operation of law. *Seavy* v. *Cloudman*, 90 Me. 536 (38 Atl. Rep. 540). Upon the death of the owner of the life estate his lessee becomes a tenant at sufferance. *Guthmann* v. *Vallery*, 51 Neb. 824 (71 N. W. Rep. 734; 66 Am. St. Rep. 475). In

New Jersey it is held that a tenant for a definite term holding over after the expiration of his term without the assent of his landlord, becomes a tenant at sufferance; and, by force of the statute (2 Gen. Stat., p. 1915, § 3) a landlord may recover from such tenant a reasonable satisfaction which is not exclusively measured by the rent stipulated for the original term. *Poole* v. *Engelke*, 61 N. J. L. 124 (38 Atl. Rep. 823). In Illinois it is held that where there is a tenancy at will or by sufferance, such a tenancy is terminated by a demand for possession without any notice to quit. *Peters* v. *Balke*, 170 Ill. 304 (48 N. E. Rep. 1012).

Sec. 460. Holding over. Where the lease provides that the lessee is to have the premises for one year and as much longer as he shall remain in business, he does not become a tenant from year to year by holding over after the expiration of the year, but he may terminate the lease at any time. *Harty* v. *Harris*, 120 N. C. 408 (27 S. E. Rep. 90). Where, at the expiration of a lease which gives the lessee the right to a renewal, the premises are untenantable, and he continues his possession under an agreement with the lessor to repair them, he is not liable for rent after his removal therefrom, the lessor having failed to perform his agreement. *Fisher* v. *Nergararian*, 112 Mich. 327 (70 N. W. Rep. 1009). Where a tenant, with the consent of his landlord, express or implied, holds over his term, the law presumes a continuation of the original tenancy for another like term and upon the same conditions; but this is not a conclusive presumption and may be overcome by evidence showing a different agreement between the parties. *Bradley* v. *Slater*, 50 Neb. 682 (70 N. W. Rep. 258). See opinion for particular evidence held insufficient to rebut the presumption. The right of a lessor to treat his lessee's holding over without his consent as a renewal of his lease, is not affected by the fact that such holding over was caused by the unavoidable sickness of the lessee and that he did not intend to renew but to vacate as soon as possible. *Mason* v. *Weirengo's Estate*, 113 Mich. 151 (71 N. W. Rep. 489). The holding over by one of several partners under a lease made to the partnership, the other partners retiring, does not renew or continue the tenancy

after the expiration of the original term. *Buchanan* v. *Whitman*, 151 N. Y. 258 (45 N. E. Rep. 556). A tenant for a definite period under an agreement binding him to pay a stipulated rent, who continues his tenancy after the expiration of the lease with the assent of the landlord, becomes a tenant at the rent specified. *Hobbs* v. *Batory*, 86 Md. 68 (37 Atl. Rep. 713). Particular holding over held to create a tenancy from year to year. *Amsden* v. *Atwood*, 69 Vt. 527 (38 Atl. Rep. 263). Construing and applying Ind. Rev. Stat. 1894, §§ 7094, 7106, it is held that the possession of a tenant holding over after a failure to pay rent in advance, as stipulated in his lease, is unlawful without notice to quit; that his landlord may maintain an immediate action for possession and damages, recovering the delinquent rent as damages and from his judgment there is no exemption. *Thomas* v. *Walmer*, 18 Ind. App. 112 (46 N. E. Rep. 695).

Sec. 461. Notice to quit. Where a monthly tenancy is claimed, a notice to quit at a period sooner or later than the day upon which the monthly tenancy expires is insufficient. *Waters* v. *Williamson*, 59 N. J. L. 337 (36 Atl. Rep. 665). Where the method for the termination of a lease by notice as prescribed by its terms is complied with, the statutory notice to quit is not required. *Quidort* v. *Bullitt*, 60 N. J. L. 119 (36 Atl. Rep. 881). In New Jersey a tenant from year to year is entitled to three months' notice to quit. *Waters* v. *Williamson*, 59 N. J. L. 337 (36 Atl. Rep. 665). Construing Kan. Gen. Stat. 1889, par. 3614, providing that "all tenancies from year to year may be determined by at least three months' notice in writing given the tenant prior to the expiration of the year," a tenant from year to year is not required to give notice to the landlord of his intention to sever the relation and to quit the premises. *Nelson* v. *Ware*, 57 Kan. 670 (47 Pac. Rep. 540). Ill. Rev. Stat., ch. 80, § 9, providing that a lease may be terminated for any default in its terms by the lessee by ten days' notice to quit, given at any time after the default, applies to leases existing at the time of the enactment of the statute; and under the provision of the statute that "no other notice or demand of possession or termination of such tenancy shall be necessary," it is held that specific

demand for the rent due is not necessary. *Woods* v. *Soucy*, 166 Ill. 407 (47 N. E. Rep. 67). Under Ind. Rev. Stat. 1894, § 7094, the possession of a tenant holding over, after failure to pay rent in advance, as stipulated in his lease, is unlawful without notice to quit. *Thomas* v. *Walmer*, 18 Ind. App. 112 (46 N. E. Rep. 695). Where a landlord who notified his tenant at will, whose rent had been $100.00 per month in advance, that the tenancy should terminate at a certain time or the rent to be doubled, subsequently accepted from the tenant, two checks for $100.00 each, sent at different times by the tenant in a letter stating that each was for a certain month's rent, he will be held to have waived any rights given him by his notice. *Murphy* v. *Little*, 69 Vt. 261 (37 Atl. Rep. 968). Where, at the time of an auction sale of premises occupied by a tenant at will from year to year, he agrees to terminate his tenancy at a certain time, he will be estopped to claim the notice to quit, to which he was entitled under the other tenancy, where the purchase was made in reliance upon his new agreement. *Woodbury* v. *Butler*, 67 N. H. 545 (38 Atl. Rep. 379). The fact that a lease is unrecorded and for that reason invalid as to third persons, does not relieve one who has purchased the rights of a lessee thereunder and occupied the premises, from his obligation to give notice of his intention to quit. *Emrich* v. *Union Stock-Yard Co.*, 86 Md. 482 (38 Atl. Rep. 943). The landlord's common law right of reentry after default in payment of rent and notice served upon the tenant to terminate the lease, if such reentry is made peaceably, is not abridged by How. Ann. Mich. Stat., §§ 8299, 8308. *Smith* v. *Detroit L. & Bldg. Ass'n*, 115 Mich. 340 (73 N. W. Rep. 395; 39 L. R. A. 410).

Sec. 462. Abandonment of premises by tenant—Rights and remedies of landlord. Where a tenant, under a lease for a definite period, abandons the premises before the expiration of his lease, the landlord is not required to relet for the protection of the tenant, but may, at his election, suffer the premises to remain vacant, and recover his rent for the remainder of the term. *Merrill* v. *Willis*, 51 Neb. 162 (70 N. W. Rep. 914). The court say: "The rule sanctioned by the decided weight of authority, if indeed there can be said to be

a diversity of opinion on the subject, is that the landlord may in such case, at his election, relet the premises upon the abandonment thereof by the tenant, in which case the measure of his damage will be the agreed rental less the amount realized on account of such reletting; or he may permit the premises to remain vacant until the end of the term, and recover his rent in accordance with the terms of the lease. See *Hayward* v. *Ramge*, 33 Neb. 836 (51 N. W. Rep. 229); *Schuisler* v. *Ames*, 16 Ala. 78 (1 Am. Dec. 168); *Tully* v. *Dunn*, 42 Ala. 262; *Rice* v. *Dudley*, 65 Ala. 68; *Ledoux* v. *Jones*, 20 La. Ann. 539; *Milling* v. *Becker*, 96 Pa. St. 182; *Randall* v. *Thompson*, 1 Willson, Civ. Cas. Ct. App., § 1102; *Respini* v. *Porta*, 89 Cal. 464 (26 Pac. Rep. 967; 23 Am. St. Rep. 488); *Clendinning* v. *Lindner* (Super. N. Y.), 30 N. Y. Supp. 543; *Underhill* v. *Collins*, 132 N. Y. 269 (30 N. E. Rep. 576); *Bowen* v. *Clarke*, 22 Ore. 566 (30 Pac. Rep. 430; 29 Am. St. Rep. 625)." Where the receiver of an insolvent lessee vacated the premises and the lessor relets the same, a presentation of a claim by the latter to the receiver for the difference between the amount of rental reserved in the first and second leases is not a cancellation of the open, subsisting engagement and substitution of a claim for a contingent liability of the original lessee, which the receiver had no power to recognize. *People* v. *St. Nicholas Bank*, 151 N. Y. 592 (45 N. E. Rep. 1129). Where a lessee abandons a lease and refuses to carry it out, the lessor may sell the same at public auction and recover at once the difference between the amount which he was to receive under the violated contract and that which he does receive from the purchaser of the lease; and the lessor's rights are not affected by the fact that he becomes a purchaser of the lease at such sale where it is regularly made upon due notice. *James* v. *Kibler's Adm'r*, 94 Va. 165 (26 S. E. Rep. 417).

Sec. 463. Attornment by tenant. Where a tenant in possession, without his landlord's consent attorns to a third party, the latter not having acquired the interest of the landlord in the real estate, either by grant or operation of law, the possessory rights of the landlord are not affected thereby, as such an attornment is void. *Perkins* v. *Potts*, 52 Neb. 110

(71 N. W. Rep. 1017); *Perkins* v. *Potts*, 53 Neb. 444 (73 N. W. Rep. 936). Where payment of rent is made by a lessee to the purchaser of the reversion on threat of suit, it will be regarded as an attornment, though the payment was expressed to be merely for the use and occupancy of the premises, and was accompanied by protest and denial of the purchaser's right to receive the money, and also a declaration that the lessee did not recognize the relation of landlord and tenant as existing between him and such purchaser. *McCardell* v. *Williams*, 19 R. I. 701 (36 Atl. Rep. 719). Under Ill. Rev. Stat., ch. 80, § 14, an assignee of the lessor has the same remedy by action for the recovery of rent as his lessor irrespective of an attornment due him by the tenant. *Barnes* v. *Northern Trust Co.*, 169 Ill. 112 (48 N. E. Rep. 81). Under N. H. Pub. Stat., ch. 246, § 22, a grantee of the premises occupied by a tenant, becomes subrogated to the rights and remedies which the grantor would have had if the estate had not been conveyed. *Woodbury* v. *Butler*, 67 N. H. 545 (38 Atl. Rep. 379).

Sec. 464. Conveyance of leased premises—Apportionment of rent. Where a lease provides for the payment of rent at specified periods, the rent for each period of time is an indivisible item, and if the lessor or landlord conveys the premises before the rent accrues, he cannot recover a proportionate amount of the rent due at the time of the conveyance although there has been no eviction by the holder of the new title or an attornment to him. Applying this rule to a conveyance of leased premises, where the lease provided for the monthly payment of rent payable "after the termination of each month," it is held that the lessee had the whole of the last day of the month in which to pay his rent and a conveyance before the close of that day by the lessor barred him of any right to claim the rent and for the purpose of determining the rights of the parties in such a case, fractions of a day may be considered. *Hammond* v. *Thompson*, 168 Mass. 531 (47 N. E. Rep. 137).

Sec. 465. Surrender. Sending a key of the premises to the owner without more, is not such a surrender and

acceptance as will discharge the tenant's liability for rent. *Newton* v. *Sheare Laundering Co.*, 19 R. I. 546 (37 Atl. Rep. 11). Citing, *Townsend* v. *Albers*, 3 E. D. Smith (N. Y.) 560; *Withers* v. *Larrabee*, 48 Me. 570; *Pier* v. *Carr*, 69 Pa. 326. A surrender takes place by operation of law, when the parties, without express surrender, do some act which implies that they have mutually agreed to consider the surrender as made. *Holman* v. *De Lin-River Finley Co.*, 30 Or. 428 (47 Pac. Rep. 708). See opinion for particular facts held not to constitute a surrender. See Ballards' Law Real Prop., Vol. IV., § 419. A surrender by operation of law is not established by proof showing that the lessee has placed another in possession of the premises from whom the lessor has accepted rent. *Decker* v. *Hartshorn*, 60 N. J. L. 548 (38 Atl. Rep. 678). Particular facts held sufficient to show an abandonment and surrender by the lessee of a mining lease. *Worrall* v. *Wilson*, 101 Ia. 475 (70 N. W. Rep. 619). Particular evidence examined and the question of surrender held to have been one for the jury. *Brewer* v. *National Union Bldg. Ass'n*, 166 Ill. 221 (46 N. E. Rep. 752).

Sec. 466. Wrongful eviction by landlord. It is held to be an unlawful eviction where during the term, a tenant removed from the premises on account of his landlord giving him notice to quit, which threatened to dispossess him, the landlord having, before such removal, taken possession of part of the premises over the tenant's protest. *Tarpy* v. *Blume*, 101 Ia. 469 (70 N. W. Rep. 620). A lessor who forcibly evicts his lessee who has a right to retain possession on account of having tendered payment of judgment and costs, under Minn. Gen. Stat. 1894, § 5865, in an action against him for possession, because of his nonpayment of rent, is responsible in damages for a wrongful eviction. *Wacholz* v. *Griesgraber*, 70 Minn. 220 (73 N. W. Rep. 7). Erecting an enclosure around leased premises and pulling down the walls of a burned building—these things being done by the landlord under orders of the municipal authorities for the purpose of insuring safety to the public, do not constitute an eviction; nor does an entry upon the premises to have brick cleaned, where it appears that the tenant had knowledge of it and

made no objection. *Fleming* v. *King*, 100 Ga. 449 (28 S. E. Rep. 239). An entry upon premises by a lessor of an oil lease and the erection of a building thereon which would not interfere with the operation of a well located by the lessee, does not constitute an eviction; but his absolute conveyance of the lands without any reservation of the lessee's rights is a constructive eviction which terminates the lessee's liability to pay rent. *Mathews* v. *People's Nat. Gas Co.*, 179 Pa. St. 165 (36 Atl. Rep. 216). The lessee of the "first floor" of a two-story building is not subject to an actual eviction by the removal of the building to another part of the lot upon which it is situated; and if he continues in possession after such removal he waives any right based upon the constructive eviction. *Lieferman* v. *Osten*, 167 Ill. 98 (47 N. E. Rep. 203; 39 L. R. A. 156). For the landlord to permit a third person to build a wall materially encroaching upon the leased premises constitutes an eviction, though the wall does not render the premises uninhabitable for the purpose for which they they were hired, or materially change the character or beneficial enjoyment thereof. *Smith* v. *McEnany*, 170 Mass. 26 (48 N. E. Rep. 781; 64 Am. St. Rep. 272). Where a lease stipulates for the payment of the rent monthly in advance, and after a default of several months the lessor enters soon after the first of the month, places a "to let" sign on the premises, and commences proceedings for the collection of his rent and the recovery of possession, all of which is done in accordance with the stipulations of the lease, such acts do not constitute such a resumption of possession by the lessor as to amount to an eviction, so as to relieve the lessee from liability for the last month's rent. *Murphy* v. *Marshall*, 179 Pa. St. 516 (36 Atl. Rep. 294).

Sec. 467. Farming on the shares. A lessee, who by subletting the premises puts it out of his power to perform his part of the lease, cannot claim the benefit of a provision in it, for the reduction of rents in case of the destruction of a portion of the crop. *Dassance* v. *Cold*, 101 Ia. 610 (70 N. W. Rep. 719). For construction of particular contracts determining who holds the title to crops raised, see *Angell* v. *Egger*, 6 N. Dak. 391 (71 N. W. Rep. 547); *Strangeway*

v. *Eisenman*, 68 Minn. 395 (71 N. W. Rep. 617); *Anderson* v. *Liston*, 69 Minn. 82 (72 N. W. Rep. 52).

Sec. 468. Landlord's lien—Priority—Statutes construed. In Mississippi it is held that a landlord has no lien on crops under an oral lease for more than one year. *Hill* v. *Gilmer*, Miss. (21 So. Rep. 528). A provision in a lease of a farm that the lessee is not to dispose of any of the produce grown on said farm until the lessor has received the rent, one-half of the taxes and certain stock are "wintered through," does not reserve a lien on the produce so as to prevent an execution sale for the lessee's debts. *Beers* v. *Field*, 69 Vt. 533 (38 Atl. Rep. 270). A mortgagee, in a recorded mortgage, may, upon his mortgagor's default, by parol agreement with him, become his landlord so as to enforce a landlord's lien against crops growing on the land, as against subsequent lienors who are charged by record with notice of the mortgagee's right of entry. Clark and Montgomery, JJ., dissenting. *Ford* v. *Green*, 121 N. C. 70 (28 S. E. Rep. 132). A landlord accepting a mortgage for rent, does not thereby lose his statutory lien. *Ladner* v. *Balsley*, 103 Ia. 674 (72 N. W. Rep. 787). Particular case in which a landlord's lien on crops was held not to be waived. *Ewing* v. *Williams*, Ky. (39 S. W. Rep. 843). In North Carolina it is held that a landlord's lien on crops has priority over his tenant's personal property exemption. *Hammer* v. *McCall*, 121 N. C. 196 (28 S. E. Rep. 297). Where an assignment is made by an insolvent tenant and the property taken possession of by the assignee before the levy of any distress warrant by the landlord for rent, the assignee will take the property free and clear of any prior lien by the landlord for unpaid rent. *Rand* v. *Francis*, 168 Ill. 444 (48 N. E. Rep. 159).

Ala. Code, §§ 3069, 3070, construed and applied—landlord's lien for rent—enforcement by attachment *Nicrosi* v. *Roswald*, 113 Ala. 592 (21 So. Rep. 338). Ia. Code 1873, § 2017, construed and applied—landlord's lien—burden of proof as to ownership of property. *Hays* v. *Berry*, 104 Ia. 455 (73 N. W. Rep. 1028). La. Rev. Civ. Code, arts. 2705, 3217–3219, construed and applied—lessor's right of pledge and

detention. *O'Kelley* v. *Ferguson*, 49 La. 1280 (22 So. Rep. 788). Tex. Rev. Stat. 1895, art. 3287, construed and applied —priority of landlord's lien. *Champion* v. *Shumate*, 90 Tex. 597 (40 S. W. Rep. 394). Utah Laws 1894, p. 128, construed and applied—lessor's lien upon tenant's goods. *Wolley* v. *Maynes-Wells Co.*, 15 Utah 341 (49 Pac. Rep. 647).

Sec. 469. Landlord's lien—Title and liability of vendee or mortgagee of crops. A landlord may enforce a claim for rent against a purchaser of crops subject to his rent lien, to the extent of their value. *McGrath* v. *Barlow*, Miss. (21 So. Rep. 237). A landlord's lien on crops cannot be enforced against a nonresident purchaser after the crops have been shipped out of the state. *Millsaps* v. *Tate*, 75 Miss. 150 (21 So. Rep. 668). A purchaser of crops from a tenant with notice of the landlord's lien thereon, or with knowledge of facts sufficient to excite inquiry as to the existence of such lien, is liable to the landlord for the value of the crops; and it is held that when a purchaser knows that the property purchased is the product of rented land, he is chargeable with notice of the landlord's lien. *Foxworth* v. *Brown*, 114 Ala. 299 (21 So. Rep. 418). Where a lease specifies that the crops raised on the premises are to belong to the landlord until the rent is fully paid, one taking a chattel mortgage from the tenant before the rent is paid, acquires no title as against the landlord, although the lease is unrecorded. *Broders* v. *Bohannon*, 30 Or. 599 (48 Pac. Rep. 692). The contrary is held in California, *Ferguson* v. *Murphy*, 117 Cal. 134 (48 Pac. Rep. 1018); where it is also held that the mere fact that the lessee obligates himself not to sell or remove crops from the premises, does not give the lessor a lien thereon, which he can enforce against third persons acquiring title to the crops in ignorance of the lessee's agreement. *Marshall* v. *Luiz*, 115 Cal. 622 (47 Pac. Rep. 597). Ia. Code 1873, § 2017, construed and applied—landlord's lien on crops —rights as against mortgagee. *Hipsley* v. *Price*, 104 Ia. 282 (73 N. W. Rep. 584).

470. Agricultural lien for advancements. A lien claimed on crops for advances made to a tenant in reliance on

the landlord's liability therefor, is superior to a chattel mortgage on the crop executed by the tenant to a third person. *Dowling* v. *Wall*, 114 Ala. 58 (21 So. Rep. 948). In Georgia it is held that the priority of a landlord's special lien upon the crop of his tenant for supplies furnished, can only be asserted by its legal foreclosure and not by the landlord purchasing the crop from the tenant at private sale. *Lightner* v. *Brannen*, 99 Ga. 606 (27 S. E. Rep. 703). N. C. Code, § 1799, construed and applied—agricultural lien for supplies furnished. *Nichols* v. *Speller*, 120 N. C. 75 (26 S. E. Rep. 632). An agricultural lien given a landlord by S. C. Rev. Stat. 1893, § 2512; Gen. Stat., § 2899, is entirely distinct from his right to distrain for rent due, and a contract curtailing his right under such lien does not waive his general right to distrain for rent due without some language expressive of such intent. *Parrott* v. *Malpass*, 49 S. C. 4 (26 S. E. Rep. 884). S. C. Rev. Stat. § 2514, construed and applied—lien for advancements. *Lockhart* v. *Smith*, 50 S. C. 112 (27 S. E. Rep. 567). S. C. Rev. Stat., 1893, § 2519; Code Civ. Proc., §§ 250, 450, construed and applied—attachment to enforce agricultural lien—vacation—procedure. *Townsend* v. *Sparks*, 50 S. C. 380 (27 S. E. Rep. 801).

Sec. 471. Repairs. Where a lease contains no stipulation or covenant on the subject, no obligation on the part of the landlord to repair is implied, nor any warranty that the premises are or will continue to be suitable for the lessee's use or business, or safe from exposure to damages from the elements through the landlord's omission to make repairs. *Hanley* v. *Banks*, 6 Okla. 79 (51 Pac. Rep. 664). Citing, *Wilkinson* v. *Clauson*, 29 Minn. 91 (12 N. W. Rep. 147); *Kreuger* v. *Farrant*, 29 Minn. 385 (13 N. W. Rep. 158; 43 Am. Rep. 223); *Jaffe* v. *Harteu*, 56 N. Y. 398 (15 Am. Rep. 438); *Mullen* v. *Raincar*, 45 N. J. L. 520; *Edwards* v. *Railroad Co.*, 98 N. Y. 245 (50 Am. Rep. 659). The rule that there is no implied covenant on the part of the landlord to make repairs extends to parts of the premises not expressly demised to the tenant but which may be necessary to his convenience or protection, such as a common roof. *Hanley* v. *Banks*, 6 Okla. 79 (51 Pac. Rep. 664). In the absence of a statute or a cove-

nant to repair, a landlord who rents the upper story of his building containing a water closet, with water fixtures, properly constructed and in good condition at the time of the lease, and who gives to the tenant the exclusive possession and control thereof, is not liable to a tenant of the lower story for damages caused by some defect in the water fixtures of said water closet accruing during the term of said lease. *Haizlip* v. *Rosenburg*, 63 Ark. 430 (39 S. W. Rep. 60). A promise to repair, made by a landlord to his tenant during the tenancy, and without other consideration than such tenancy, cannot be enforced. The measure of damages for breach of a lessor's contract to repair is the difference between the rental value of the premises with the repairs and the value without the repairs. *Taylor* v. *Lehman*, 17 Ind. App. 585 (46 N. E. Rep. 84). In the recent case of *McCardell* v. *Williams*, 19 R. I. 701 (36 Atl. Rep. 719), the court say: 'Where a landlord has covenanted to repair, and does not do so, the tenant has several remedies: He may abandon the premises if by reason of want of repair, they have become untenantable. *Sheary* v. *Adams*, 18 Hun. 181; *Lawrence* v. *Burrell*, 17 Abb. N. C. 312; *Prescott* v. *Overstatter*, 85 Pa. St. 534; *Bissell* v. *Lloyd*, 100 Ill. 214; *Lewis* v. *Chisholm*, 68 Ga. 40. He may make the repairs and deduct the cost from the rent. *Sparks* v. *Bassett*, 49 N. Y. Super. Ct. 270; *Myers* v. *Burns*, 35 N. Y. 269; *Wright* v. *Lattin*, 38 Ill. 298. He may occupy the premises without repair and recoup his damages in an action for the rent. *Westlake* v. *De Graw*, 25 Wend. 669; *Wright* v. *Lattin*, 38 Ill. 298. He may sue for damages for the breach of covenant to repair. *Lewis* v. *Chisholm*, 68 Ga. 40; *Block* v. *Ebner*, 54 Ind. 544; *Buck* v. *Rodgers*, 39 Ind. 222; *Hexter* v. *Knox*, 39 N. Y. Super. Ct. 109." Particular evidence held to show that a landlord authorized the tenant to make repairs. *Sheehan* v. *Winehill*, 18 Wash. 447 (51 Pac. Rep. 1065).

Sec. 472. Repairs—Liability for negligence in making. A landlord is liable for his failure to exercise reasonable care to protect his tenants from injury during the making of improvements or repairs which are of such a nature as to render a portion of the premises unsafe for use, *Robbins* v.

Atkins, 168 Mass. 45 (46 N. E. Rep. 425); and he cannot escape this liability by placing the work with an independent contractor; especially if the work to be done is attended with danger to the tenants. *Wertheimer* v. *Saunders*, 95 Wis. 578 (70 N. W. Rep. 824; 37 L. R. A. 146); *Wilber* v. *Follansbee*, 97 Wis. 577 (72 N. W. Rep. 741). But in Missouri it is held that a landlord employing an independent contractor to build a privy on leased premises is not liable for the negligence of such contractor in leaving an excavation filled with water which caused the death of the lessee's child. *Wiese* v. *Remme*, 140 Mo. 289 (41 S. W. Rep. 797). Where, for a valuable consideration a tenant agrees that his landlord may make certain alterations and repairs, and the latter contracts with a competent mechanic to do the work, who has entire supervision and control of it, the landlord is not liable for damages resulting to the property of the tenant occasioned by the contractor's negligence. *Stanley* v. *Chicago Trust & Sav. Bank*, 165 Ill. 295 (46 N. E. Rep. 278).

Sec. 473. Miscellaneous notes. An action for the unlawful interference with the full enjoyment of the possession of leased premises is in the tenant in possession and not in the landlord. *Kansas City, Ft. S. & M. R. Co.* v. *King*, 68 Ark. 251 (38 S. W. Rep. 18). The death of the tenant for life terminates the lease of the premises existing between him and his lessee, and the latter may at once quit possession without incurring any liability to the reversioner for rent. *Guthmann* v. *Vallery*, 51 Neb. 824 (71 N. W. Rep. 784; 66 Am. St. Rep. 475). Miss. Ann. Code 1892, § 1068, construed and applied—action for enticing tenant—constitutionality of statute—sufficiency of evidence. *Hoole* v. *Dorroh*, 75 Miss. 257 (22 So. Rep. 829).

LEASES.

EPITOME OF CASES.

Sec. 474. What constitutes a lease—Execution—Validity. An instrument by which an owner of land grants, demises and lets to another the "perpetual use" of a strip of land for a tramway, which the grantee agrees to build, such right and privilege to exist so long as the premises shall be used for the purpose agreed on and no longer, does not convey a fee, but is merely a lease which may be terminated by the nonperformance of the condition subsequent. *Knapp* v. *Crawford*, 16 Wash. 524 (48 Pac. Rep. 261). To give effect to a lease of real property, it must describe the subject matter of the demise with reasonable certainty, either by express words or by reference to something by which its location can be ascertained; and the want of such a description will render the lease inoperative. *Bingham* v. *Honeyman*, 32 Or. 129 (51 Pac. Rep. 735; 52 Pac. Rep. 755). Citing, 1 Tayl. Landl. & Ten., § 160; Wood, Landl. & Ten., § 211; *Noyes* v. *Stauff*, 5 Or. 455; *House* v. *Jackson*, 24 Or. 89 (32 Pac. Rep. 1027); *Dingman* v. *Kelly*, 7 Ind. 717. A lease of premises to be used for the sale of intoxicating liquors does not become void under Ohio Rev. Stat., § 4364, until the premises have been used for the unlawful traffic in intoxicating liquors. *Goodall* v. *Gerke Brewing Co.*, 56 O. St. 257 (46 N. E. Rep. 983). Iowa Acts, 25 Gen. Assem., ch. 62, construed and applied—validity of lease of building for saloon purposes. *McKeever* v. *Beacom*, 101 Ia. 173 (70 N. W. Rep. 112). A lease of lands in the Cherokee Outlet made by the Cherokee Nation in violation of U. S. Rev. Stat., § 2116, is void. *Mayes* v. *Cherokee Strip Live-Stock Ass'n.*, 58 Kan. 712 (51 Pac. Rep. 215). Particular contract held not to be a lease but a contract of service. *Moreland* v. *Strong*, 115 Mich. 211 (73 N. W. Rep. 140). Particular evidence held insufficient to warrant the cancellation of a wharf lease because of false representations. *Ranstead* v. *Allen*, 85 Md. 482 (37 Atl. Rep. 15).

Sec. 475. Parol leases. In Iowa it is held that evidence of part performance of an oral contract to lease land, for such a term as the statute of frauds requires a written instrument, will not take the contract out of the operation of the statute. *Powell* v. *Crampton*, 102 Ia. 364 (71 N. W. Rep. 579). Particular parol leases, void on account of the statute of frauds, held to create a tenancy at will. *Barrett* v. *Cox*, 112 Mich. 220 (70 N. W. Rep. 446); *McIntosh* v. *Hodges*, 110 Mich. 319 (70 N. W. Rep. 550.)

Sec. 476. Construction of leases. Where one agrees to inclose unimproved land and make certain improvements thereon in consideration of having the use of it for a term of years, he has the right to the entire term in which to complete the improvements on the land. *Wilson* v. *Owens*, Ind. Ter. (38 S. W. Rep. 976). A provision in a lease that until the lessor shall cause the premises to be heated by steam heat his rent shall be a certain sum per month, does not bind the lessor to furnish steam heat. *Gatch* v. *Garretson*, 100 Ia 252 (69 N. E. Rep. 550). A provision in a lease of a part of a building on a city street, authorizing the lessee to occupy a designated portion of the sidewalk next to the building with a fruit and nut stand, will be construed as a mere license subject to the municipal control over sidewalks. *Brown* v. *Schiappacassee*, 115 Mich. 47 (72 N. W. Rep. 1096). A provision in a lease obligating the lessee to pay all assessments for street improvements levied during the term, does not authorize the lessee to bind the owner by executing a promise, required of such owner, under Ia. Acts 21st Gen. Assem., ch 168, §§ 17, 18, to waive all irregularities, in consideration of the right to pay street improvements in installments. *Vorse* v. *Des Moines Marble & Mantel Co.*, 104 Ia. 541 (73 N. W. Rep. 1064). A printed provision in a lease authorizing a forfeiture and reentry if the lessee shall make default in the performance of any covenant contained therein, applies to a written provision that the lessee shall pay all taxes on the property before they become delinquent. *Heiple* v. *Reinhart*, 100 Ia. 525 (69 N. W. Rep. 871). Where a lessee took possession of premises on April 8, 1892, under a lease bearing that date providing that said lease was "to extend for the

term of one year from the date hereof," it is held that the term expired at midnight of April 7, 1893. *Buchanan* v. *Whitman*, 151 N. Y. 253 (45 N. E. Rep. 556). Where one acquainted with a building in course of erection and all of its surroundings, takes a lease which recites that he has hired all that certain store, basement and vault, now in course of erection, on that certain lot of land and premises * * * known as street No. 85, N. street," it is held that only the building is demised and not the small open places between it and another building of the lessor, left for the purpose of furnishing air and light. *Klie* v. *Von Broock*, 56 N. J. Eq. 18 (37 Atl. Rep. 469). A provision in a lease releasing the lessor from liability from loss to the lessee's property on the premises, "if the whole or any part thereof shall be destroyed or damaged by fire, water or otherwise, or by the use or abuse of the cochituate water, or by the leakage or bursting of water pipes, or in any other way or manner," does not relieve the lessor from liability from damage to his tenant's property resulting from his negligent operation of heating apparatus in other portions of the building which remain under his control. *Railton* v. *Taylor*, 20 R. I. 279 (38 Atl. Rep. 980; 39 L. R. A. 246). Where a lease was for fifteen years "unless sooner terminated by parties of the first part as hereinafter provided for," and under the provision referred to the lessors could terminate the lease at the expiration of ten years upon giving notice of their desire to do so, in which event arbitrators were to be chosen "to inquire and determine what damages, if any, shall be paid by one of the parties hereto to the other in consideration of the termination of this lease at the time," it is held that the giving of the notice operates to terminate the lease and that the making of the arbitration provided for is not a condition precedent to such termination. *Smith* v. *Rasin*, 84 Md. 642 (36 Atl. Rep. 261). For construction of particular leases, see *Jamaica Pond Ice Co.* v. *Boston Ice Co.*, 169 Mass. 84 (47 N. E. Rep. 442); *Ely* v. *Randall*, 68 Minn. 177 (70 N. W. Rep. 980); *Rankin Co.* v. *Busick*, Miss. (22 So. Rep. 801). For construction of particular provision as to the reduction of rent, see *Goldsmith* v. *Southwell*, 95 Wis. 176 (70 N. W. Rep. 72). For the construction of a particular lease and waiver of lessor's right to enforce for-

feiture, see *Cook* v. *Parker*, 67 Minn. 374 (69 N. W. Rep. 1099).

Sec. 477. Construction of leases—Stipulations as to the payment of rent—Determination of rent by appraisement. Where the lease stipulates that the rent shall be paid in monthly installments and provides that upon the lessee's failure to pay the same for five days after it becomes due, the whole rent reserved shall become due, the lessor having the right to avail himself of this stipulation, does not waive it by acceptance of overdue rent. *Teufel* v. *Rown*, 179 Pa. St. 408 (36 Atl. Rep. 224). Where a lease provides for the payment of the rent in monthly installments and requires the first payment to be made on the first day of the term, but does not provide for the payment in advance of the other payments, a failure of the lessee to pay in advance for a subsequent month is not a ground for forfeiture of the lease. *Liebe* v. *Nicolai*, 30 Or. 364 (48 Pac. Rep. 172). The court say: 'The rule seems to be well settled that, when the lease contains no covenant fixing the time when the rent shall become due, it is payable at the end of the term. *Boyd* v. *McCombs*, 4 Pa. St. 146; *Gravey* v. *Dobyns*, 8 Mo. 213; *Ridgley* v. *Stillwell*, 27 Mo. 128; *Duryée* v. *Turner*, 20 Mo. App. 34; *Bordman* v. *Osborn*, 28 Pick, 295; *Dinon* v. *Nicolls*, 39 Ill. 372 (89 Am. Dec. 312)."

Where the lease provides for the determination of the amount of rent by appraisers, to be selected in a certain manner, a court of equity has power to make the appraisement where the appraisers are not selected or fail to act. *Grosvenor* v. *Flint*, 20 R. I. 21 (37 Atl. Rep. 304). See Ballards' Law of Real Prop., Vol. IV, § 482. Where a lease of lands, bounded on one side by a river, provides for the payment of a certain per cent. of the appraised value of the land as rental, appraisements to be made at stated intervals, it is held that the lessor is entitled to have considered accretions formed by the recession of the river since the preceding appraisement. *Allen* v. *St. Louis, I. M. & S. Ry. Co.*, 137 Mo. 205 (38 S. W. Rep. 957).

Sec. 478. Covenants in leases. In the absence of a contrary provision, a covenant for quiet enjoyment will be

implied. *Hanley* v. *Banks*, 6 Okla. 79 (51 Pac. Rep. 664). A lessee's covenant to pay "the water tax and one-half of all other taxes levied on said property," does not include taxes for municipal improvements. *De Clercq* v. *Barber Asphalt Pav. Co.*, 167 Ill. 215 (47 N. E. Rep. 367). The purpose for which property is leased must be observed, and the acceptance of a lease of premises for a certain purpose amounts to a covenant on the part of the lessee that he will so use them, a violation of which may be enjoined by the lessor. *Spalding Hotel Co.* v. *Emerson*, 69 Minn. 292 (72 N. W. Rep. 119). A covenant in a lease against an assignment or subleasing by the lessees without the consent of the lessor, is for the benefit of the latter and can only be enforced by him. *Holman* v. *De Lin-River-Finley Co.*, 30 Or. 428 (47 Pac. Rep. 708). A lessor failing to comply with his agreement to furnish water for a farm, is not liable for the lessee's expense in procuring water by an unnecessarily expensive mode. *Ladner* v. *Balsley*, 108 Ia. 674 (72 N. W. Rep. 787). Applying Cal. Civ. Code, § 1927, providing that "an agreement to let upon hire binds the letter to secure to the hirer the quiet possession of the thing hired during the term of the hiring, against all persons lawfully claiming the same," it is held that while the owner of a building consisting of several floors may make repairs, a tenant of one of the floors who is injured thereby may recover damages from the landlord for breach of covenant of quiet enjoyment irrespective of his negligence. *McDowell* v. *Hyman*, 117 Cal. 67 (48 Pac. Rep. 984). See Repairs.

Sec. 479. Renewal of lease. A covenant to extend or renew a lease, implies the making of a new lease. *Kollock* v. *Kaiser*, 98 Wis. 104 (73 N. W. Rep. 776). Citing, *Orton* v. *Moonan*, 27 Wis. 272. A mere covenant to renew a term at the option of the lessee is not an actual renting for a longer period than the term specified. *James* v. *Kibler's Adm'r*, 94 Va. 165 (26 S. E. Rep. 417). The renewal of a lease by a partnership lessor, which the statute requires to be in writing, cannot be made by a surviving partner, unless authorized in writing by the heirs of the deceased partner. *Oliver* v. *Olmstead*, 112 Mich. 483 (70 N. W. Rep. 1036). The renewal of a lease upon the same terms, conditions and limitations as

expressed in the original instrument, adopts the terms of the original lease as to the manner of the termination of the new term. *Quidort* v. *Bullitt*, 60 N. J. L. 119 (36 Atl. Rep. 881). A general covenant in a lease to extend or renew, implies the making of a new lease for an additional term equal to the first and upon the same terms including that of rent, except the covenant to renew. Such general covenant to extend or renew the lease does not imply a continuation or renewal of the special covenant, because that would have the effect, by construction, to make the lease perpetual, or to call for renewals in perpetuity. *Kollock* v. *Kaiser*, 98 Wis. 104 (73 N. W. Rep. 776). Citing, *Rutgers* v. *Hunter*, 6 Johns., ch. 215; *Cunningham* v. *Pattee*, 99 Mass. 248; *Ranlet* v. *Cook*, 44 N. H. 512 (84 Am. Dec. 92); *McAdoo* v. *Callum*, 86 N. C. 419; *Tracy* v. *Exchange*, 7 N. Y. (3 Selden) 472 (57 Am. Dec. 538); *Transportation Co.* v. *Lansing*, 49 N. Y. 499; *Hughes* v. *Windpfennig*, 10 Ind. App. 122 (37 N. E. Rep. 482).

Sec. 480. Assignment of leases. Possession of the leased premises by a third person under the lessee, creates the presumption that the lease has been assigned by the lessee to such person. *Dickinson* v. *Fitterling*, 69 Minn. 162 (71 N W. Rep. 1030). Where the lessor of property assigns a lease, the lessee is under legal obligation to pay the rent to the assignee. *Kelly* v. *Bowerman*, 113 Mich. 446 (71 N. W. Rep. 836). The assignment of a partnership lease made by one of the firm is valid if made by the authority of the other members of the firm or ratified by them. *Edwards* v. *Spalding*, 20 Mont. 54 (49 Pac. Rep. 443). The mere acceptance of rent from the assignee of a lease does not release his assignor. *Edwards* v. *Spalding*, 20 Mont. 54 (49 Pac. Rep. 443). Although a landlord may have given his consent to an assignment by the lessee, and accepted the assignee as his tenant, and received rent from him, yet the lessee is not released from his express covenant to pay rent, unless the landlord has accepted the surrender of the lessee and released him. *Barnes* v. *Northern Trust Co.*, 169 Ill. 112 (48 N. E. Rep. 81). An action by a lessor on the covenants of the lease brought against an assignee at the request of the original lessee, does

not operate to release the latter from his liability. *Whitcomb* v. *Cummings*, N. H. (38 Atl. Rep. 503).

Sec. 481. Assignment of lease—Liability of assignee. An assignee of an undivided one-half of the lessee's interest becomes jointly liable with the lessee on the covenants in the lease. *Jackson* v. *O'Hara*, 188 Pa. St. 288 (38 Atl. Rep. 624). An assignee of a lease is liable on the covenants therein which run with the land. The rule is that, as the liability of the assignee grows out of privity of estate, and that only, it ceases when that privity ceases to exist; and each successive assignee is liable for only such breaches of covenant as occur while there is privity of estate between him and the lessor. An assignee does not create a personal obligation which continues beyond the existence of the privity of estate, by a stipulation in the assignment that he takes "subject to the agreement in the lease." *Consolidated Coal Co.* v. *Peers*, 166 Ill. 361 (46 N. E. Rep. 1105; 38 L. R. A. 624). See Ballards' Law Real Prop., Vol. V, § 462.

Sec. 482. Destruction of leased premises. In the absence of a covenant to that effect, a lessee is not bound to restore a building destroyed by accident without fault or negligence on his part. *Earl* v. *Arbogast*, 180 Pa. St. 409 (36 Atl. Rep. 923); *Armstrong* v. *Maybee*, 17 Wash. 24 (48 Pac. Rep. 737; 61 Am. St. Rep. 898). Where the lessee covenants to keep the demised premises in repair, and at the termination of the lease to surrender them in as good condition as they were at the date of the lease, he is liable for the destruction of the property, although it occurred without his fault. *Prtest* v. *Foster*, 69 Vt. 417(38 Atl. Rep. 78). Citing, *Hoy* v. *Holt*, 91 Pa. St. 88 (36 Am. Rep. 659); *Phillips* v. *Stevens*, 16 Mass. 237; *Polack* v. *Pioche*, 35 Cal. 416 (95 Am. Dec. 115); *Linn* v. *Ross*, 10 Ohio 412 (36 Am. Dec. 95). Substantially the same is held by the supreme court of Washington, *Armstrong* v. *Maybee*, 17 Wash. 24 (48 Pac. Rep. 737; 61 Am. St. Rep. 898). In Nebraska it is held, by a divided court, that an express agreement of a lessee to keep in good repair leased premises, and, at the expiration of the term, surrender their possession in as good con-

dition as they were when he entered, natural decay, wear and tear excepted, is not, and does not include, a covenant to rebuild buildings destroyed without his fault; if such was the common-law rule of construction of such a covenant, it is not in force in this state; where a substantial portion of leased premises is destroyed without the fault of the lessee, he is entitled to apportionment of the rent covenanted to be paid, and accruing thereafter, in the absence of an express assumption by him of the risk of such destruction. *Wattles* v. *South Omaha Ice & C. Co.*, 50 Neb. 251 (69 N. W. Rep. 785; 61 Am. St. Rep. 554; 36 L. R. A. 424). The legal liability of a tenant in case of a destruction of the property by fire, cannot be changed by proof of a local custom. *Fleming* v. *King*, 100 Ga. 449 (28 S. E. Rep. 239). A tenant will not be held liable for the destruction of a leased building by fire on acount of his having removed pipes placed in it for extinguishing fires, where it is not shown that if the pipes had not been removed the fire could have been extinguished. *Frank* v. *Head*, Ky. (42 S. W. Rep. 913). Where, in order to relieve a lessee from his common law liability to pay rent for the term after the destruction of the premises, it is covenanted in the lease providing for the payment of monthly rent in advance that in case any building should be destroyed or injured by the elements or other cause, so as to be unfit for occupancy, without any fault or neglect on the part of the lessee, he should not be liable to pay rent after a surrender of possession, it is held that such provision does not reserve to the lessee the right to recover back any portion of the monthly installments of rent once paid on account of his surrender of the premises in pursuance thereof, before the expiration of the month for which he has paid rent. *Felix* v. *Griffiths*, 56 O. St. 39 (45 N. E. Rep. 1092). Where, on account of the destruction of a portion of the premises and the necessary occupancy of the landlord in repairing, the tenant is deprived of the use of a portion of the premises, he is entitled to a deduction in his rent to the extent of the value of such use, to be measured by the difference in rental value. *Wayne* v. *Lapp*, 180 Pa. St. 278 (36 Atl. Rep. 723). In Georgia the tenant of a rented house is liable for the stipulated rent to the end of his term, notwithstanding the destruction of the house

before that time, unless the landlord does some act which in law amounts to an eviction of the tenant. *Fleming* v. *King*, 100 Ga. 449 (28 S. E. Rep. 239). N. J. Gen. Stat. Vol. 2, p. 1928, par. 85, relating to buildings on leased premises damaged by fire, does not apply to a tenancy at sufferance. *Poole* v. *Engelke*, 61 N. J. L. 124 (38 Atl. Rep. 828).

Sec. 483. Miscellaneous notes. One taking a lease from a lessee with knowledge that he is such, becomes a subtenant, whom the owner may treat as his tenant at his election. *McConnell* v. *East Point Land Co.*, 100 Ga. 129 (28 S. E. Rep. 80). The lessee's right to access to adjoining premises subsequently leased by him, through openings in an adjacent wall, is subject to the right of his first lessor to close such opening by the erection of a wall upon his premises. *Klie* v. *Von Broock*, 56 N. J. Eq. 18 (37 Atl. Rep. 469). The holder of a lease has such an interest in the premises as enables him to maintain an action for damages resulting to his leasehold estate, in consequence of the construction of duly authorized public improvements. *Pause* v. *City of Atlanta*, 98 Ga. 92 (26 S. E. Rep. 489; 58 Am. St. Rep. 290). The measure of damages for failure to deliver a building to the tenant according to the terms of a contract to build and lease to him a building of such unprecedented size that no one but the tenant would be likely to make it serviceable in his business, is the difference between the rent provided for in the contract and the value or rental value of the property. *Jonas* v. *Noel*, 98 Tenn. 440 (39 S. W. Rep. 724; 36 L. R. A. 862). The right of a member of the Chickasaw Nation to occupy a portion of the common lands, is an estate sufficient to support a lease of such portion. *Wilcoxen* v. *Hybarger*, Ind. Ter. (38 S.W. Rep. 669). La. Rev. Civ. Code, art. 346, construed and applied—power of tutor to lease or cultivate minor's property and to borrow money thereon. *Scottish-American Mortg. Co.* v. *Ogden*, 49 La. 8 (21 So. Rep. 116). N. C. Code, § 1761, construed and applied—sufficiency of indictment for arson by a lessee. *State* v. *Graham*, 121 N. C. 623 (28 S. E. Rep. 409).

LICENSE.

EPITOME OF CASES.

Sec. 484. Creation of license—Assignment. An agent for the sale of land who has no authority to make a contract without the owner's consent, cannot create a binding parol license affecting the property. *Noftsger* v. *Barkdall*, 148 Ind. 531 (47 N. E. Rep. 960). A provision in a conveyance of a piece of upland, by one owning an intervening tract fronting the sea, giving his grantee the right to enter on the latter tract, "erect bath houses and use the same free of charge, undisturbed at any time," is held to be a license revocable by the death of the parties or by a subsequent conveyance; and this is true, although in connection with the privilege the instrument grants an easement of way to the grantee. *Eckert* v. *Peters*, 55 N. J. Eq. 379 (36 Atl. Rep. 491). A license granted by the owner of land for another to erect a building thereon, with the right to use and occupy it and with privilege of ingress and egress, conveys only a personal right to the grantee and is not assignable. An attempted sale of his rights by such a licensee operates to terminate the privilege. *Bates* v. *Duncan*, 64 Ark. 339 (42 S. W. Rep. 410; 62 Am. St. Rep. 190). In support of the first proposition the court cite, *Jackson* v. *Babcock*, 4 Johns. 418; *Harris* v. *Gillingham*, 6 N. H. 9 (23 Am. Dec. 701); *Prince* v. *Case*, 10 Conn. 375 (27 Am. Dec. 675); *Jamieson* v. *Millemann*, 3 Duer 255; *Dark* v. *Johnson*, 55 Pa. St. 164 (93 Am. Dec. 732); *Pearson* v. *Hartman*, 100 Pa. St. 84; Washb. Easem. (4th Ed.) 17.

Sec. 485. Revocation of license. Until there has been an expenditure of money in reliance upon a parol license it is revocable. *Noftsger* v. *Barkdall*, 148 Ind. 531 (47 N. E. Rep. 960). A parol sale of growing trees to be cut and removed confers a license to enter on the land, revocable at

the will of the vendor. *Walton* v. *Lowrey*, 74 Miss. 484 (21 So. Rep. 243). A licensee of real estate for a particular use forfeits his right and subjects himself to ejectment by permitting an inconsistent use of the premises. *Mayor of Chauncey* v. *Brown*, 99 Ga. 766 (26 S. E. Rep. 763). The death of the licensor operates as a revocation of a parol license, where it is unexecuted. *Spacy* v. *Evans*, Ind. (48 N. E. Rep. 855). Citing, *Hawley* v. *Smith*, 45 Ind. 183; *Hunt* v. *Rousmanier's Adm'rs*, 8 Wheat. 174; *Carter* v. *Page*, 26 N. C. 424; *De Haro* v. *U. S.*, 5 Wall. 599; *Putney* v. *Day*, 6 N. H. 430 (25 Am. Dec. 470); 5 Lawson, Rights, Rem. & Prac., § 2674; *Ruggles* v. *Lesure*, 24 Pick. 187; *Carleton* v. *Redington*, 1 Fost. (N. H.) 291; *Johnson* v. *Carter*, 16 Mass. 443. In Illinois it is held that a parol license within the statute of frauds is revocable at any time. *Wilmington Water-Power Co.* v. *Evans*, 166 Ill. 548 (46 N. E. Rep. 1083). In Michigan it is held that a parol license to a railroad to enter upon land and construct its road is revocable at the will of the owner. *Minneapolis, St. P & S. Ste M. Ry. Co.* v. *Marble*, 112 Mich. 4 (70 N. W. Rep. 319). In West Virginia it is held upon an exhaustive review of the conflicting authorities, that a mere oral license to construct an underground drain, by one lot owner in a town to a neighboring lot owner, for the purpose of draining the lot of the licensee, although executed and in full use and enjoyment, is revocable at the pleasure of the licensor, and that the fact of entire performance of the contract, even though with full consideration, will not entitle the licensee to the permanent use of the drain. *Pifer* v. *Brown*, 48 W. Va. 412 (27 S. E. Rep. 399). Where one, relying upon a parol license to erect an outside stairway upon the land of another, expends large sums of money in the erection of a building, to a part of which the stairway forms the only means of access, the license will be treated as irrevocable. *Joseph* v. *Wild*, 146 Ind. 249 (45 N. E. Rep. 467).

LIENS.

EPITOME OF CASES.

Sec. 486. Priority of liens. A valuable consideration is necessary to support the claim of an equitable right to priority over an equitable mortgage, and where one claims such priority as a security for services rendered, it cannot extend to services rendered after notice of the mortgage. *Yarnell* v. *Brown*, 170 Ill. 362 (48 N. E. Rep. 909; 62 Am. St. Rep. 380). A lien on abutting property for street improvements, authorized by art. 2, § 7, of the charter of the city of Covington, Ky., is held to be paramount to the lien of a mortgage taken after the charter was enacted but before the ordinance authorizing the improvements was passed. *Dressman* v. *Farmers & Traders' Nat. Bank*, 100 Ky. 571 (38 S. W. Rep. 1052; 36 L. R. A. 121).

Sec. 487. Judgment liens—General principles—Statutes construed. A judgment which fails to state the amount for which it is rendered is insufficient to create a lien. *Roane* v. *Hamilton*, 101 Ia. 250 (70 N. W. Rep. 181). Where an executrix is also a devisee, and a judgment is recovered against her as executrix, *eo nomine*, upon a claim against the decedent's estate, the judgment is no lien either upon the estate of the decedent, or upon the estate which came to the defendant, not as executrix, but as devisee of the lands of the testator. *Mott* v. *German Hospital*, 55 N. J. Eq. 722 (37 Atl. Rep. 757). Under Cal. Code Civ. Proc., § 726, the proceedings in foreclosure cases do not constitute a lien until the docketing of a deficiency judgment. *Carpenter* v. *Lewis*, 119 Cal. 18 (50 Pac. Rep. 925). Under Mont. Code Civ. Proc., § 307, a judgment does not become a lien on real estate until docketed, regardless of when it was rendered, *Sklower* v. *Abbott*, 19 Mont. 228 (47 Pac. Rep. 901). Construing and applying Ind. Rev. Stat. 1894, § 588, requiring

judgments to be entered in the order book, § 591, requiring the clerk to keep a docket in which he shall enter "within thirty days after each term of the court" a statement of each judgment rendered, § 593, making such docket a record to be open for examination, § 594, making the clerk liable to "any person injured" as a result of his neglecting to enter any judgment, and § 617, making all final judgments a lien on land for ten years after the "rendition thereof," it is held that the lien of a judgment is not lost by the failure of the clerk to enter it on the judgment docket, and that the remedy for damages against such officer for his failure in this particular is for the benefit of *bona fide* purchasers who have suffered thereby. *Johnson* v. *Schlosser*, 146 Ind. 509 (45 N. E. Rep. 702; 58 Am. St. Rep. 367; 36 L. R. A. 59). Under Mill. & V. Tenn. Code. §§ 3694, 3695; Shannon's Code, §§ 4708, 4709, the lien of a judgment fastens upon land only when obtained in the county where the debtor resides at the time of its rendition or when registered in such county if he be a resident of the state. *Bridges* v. *Cooper*, 98 Tenn. 394 (39 S. W. Rep. 723). Under W. Va. Laws 1882, ch. 126, before a court can decree a sale of a judgment debtor's property to pay the judgment liens thereon, the full amount of the property subject thereto must be ascertained and it must appear to the court that the rents and profits thereof will not pay the judgment within five years. *Newlon* v. *Wade*, 43 W. Va. 283 (27 S. E. Rep. 244). Under N. J. Act. Feb. 18, 1799 (Pat. Laws, p. 373) a judgment on a claim filed against an executor or administrator is not a lien on the decedent's land. *Mott* v. *German Hospital*, 55 N. J. Eq. 722 (37 Atl. Rep. 757).

Sec. 488. Judgment lien — Estate to which it attaches. The lien of a judgment of the district court of Nebraska, attaches to all the lands of the debtor within the county where the judgment was rendered, whether then owned by him or subsequently acquired. *Duell* v. *Potter*, 51 Neb. 241 (70 N. W. Rep. 932). The lien of a judgment attaches only to such interest as the judgment defendant has in real estate at the time it is docketed. Wis. Rev. Stat., § 2902, applied. *Stanhilber* v. *Graves*, 97 Wis. 515 (73 N. W. Rep. 48). The lien of a judgment of a court of record attaches to after-ac-

quired land at the moment of its acquisition, the same as that owned by the debtor at the rendition of the judgment and continues for the same length of time. Mill. & V. Tenn. Code, § 3696; Shannon's Code, § 4710, applied. *Bridges* v. *Cooper*, 98 Tenn. 394 (39 S. W. Rep. 728). A contingent interest in real estate is subject to attachment under R. I. Gen. Laws, ch. 253, § 10, allowing attachment of "real estate, or the right, title, and interest of any defendant therein." *Wood* v. *Watson*, 20 R. I. 228 (37 Atl. Rep. 1030). In Indiana it is held that a judgment is not a lien upon land of the debtor which is exempt from execution sale. *Citizens' State Bank* v. *Harris*, 149 Ind. 208 (48 N. E. Rep. 856). The lien of a judgment does not attach to the rents of the real estate as against a receiver of the judgment debtor. *Mann* v. *Poole*, 48 S. C. 154 (26 S. E. Rep. 229).

Judgment liens bind the debtor's equitable interest in real estate. *In re Fair Hope North Savage Fire Brick Co.'s Estate*, 183 Pa. St. 96 (38 Atl. Rep. 519). The lien of a judgment does not attach to lands, the legal title of which is held in trust by the debtor for another. *Davenport* v. *Stephens*, 95 Wis. 456 (70 N. W. Rep. 661). Where the proportionate part of a beneficiary in a trust estate, consisting of real and personal property, is fixed by the will creating it, but the specific property of which his interest should consist is left wholly within the control of the trustee to be determined by an apportionment to be made by them at a subsequent time, until such apportionment, the beneficiary has not such interest in any of the land as may be subjected to the lien of a judgment against him. *In re Handy's Estate*, 182 Pa. St. 68 (37 Atl. Rep. 854).

Sec. 489. Judgment liens—Extent of. Under Mill. & V. Tenn. Code, §§ 5025, 5029; Shannon's Code, §§ 6091, 6095, general creditors may file a bill to establish their lien against their debtor's equity of redemption in mortgaged lands, and if the mortgage has matured they may ask for a sale under it. Their lien covers the whole of the debtor's interest in the land and expands from time to time in scope and value as his interest may be enlarged by successive payments of the mortgage debt; and finally it embraces the whole

estate when total extinguishment of the incumbrance has been accomplished. *Briggs* v. *Cooper*, 98 Tenn. 381 (39 S. W. Rep. 720).

Sec. 490. Judgment liens—Priority of liens. As against purchasers and mortgagees at different dates of different parcels of land the whole of which is subject to a prior judgment lien, such lien will be enforced against such parcels in the inverse order of their alienation, regardless of the fact that the judgment debtor acquired them at different times and from different sources. *Meek* v. *Thompson*, 99 Tenn. 732 (42 S. W. Rep. 685). Where a judgment creditor accepts a conveyance of land from his debtor specifying that it is made subject to the lien of another judgment creditor, as between the parties to such a conveyance, the lien of the judgment referred to is absolute. *Freeman* v. *Brockway*, 24 Colo. 441 (50 Pac. Rep. 32). An alleged fraudulent grantee of lands may purchase a judgment upon which a creditor's bill has been filed against him, to set aside the conveyance to him as fraudulent, and claim the benefit of the priority acquired by the holder of such judgment on account of bringing the suit. *Boggs* v. *Douglass*, 100 Ia. 385 (69 N. W. Rep. 689); *Daisy Roller Mills* v. *Ward*, 6 N. Dak. 317 (70 N. W. Rep. 271). Judgment creditors asserting the priority of their liens over a mortgage upon the debtor's land, must show that their judgments were rendered in the county in which the land is situated, and this fact will not be presumed. Ind. Rev. Stat. 1894, § 617. *Hill* v. *Swihart*, 148 Ind. 319 (47 N. E. Rep. 705). The lien of general creditors against their debtor, by filing a bill under Mill. & V. Tenn. Code, §§ 5025, 5029; Shannon's Code, §§ 6091, 6095, to enforce their claims against his equity of redemption in lands subject to a prior matured mortgage, has priority over the rights of his mortgagee who subsequently releases the mortgage in order to enable the mortgagor to sell the premises and takes an assignment of the purchase money notes given by the purchaser, which are secured by a vendor's lien. *Bridges* v. *Cooper*, 98 Tenn. 381 (39 S. W. Rep. 720). The fact that the holder of a first judgment lien upon several tracts of land releases it as to one of the tracts, which the judgment debtor has conveyed to

another, does not postpone such lien as to other land retained by the debtor in favor of junior judgments which were not a lien on the land conveyed; and this rule is not affected by the fact that the debtor reserved a vendor's lien on the land conveyed and the judgment creditor did not require the money due from the grantee to the grantor to be applied in reduction or payment of his judgment. *Blakemore* v. *Wise*, 95 Va. 269 (28 S. E. Rep. 882; 64 Am. St. Rep. 781).

Sec. 491. Judgment liens—Priority over unrecorded conveyances. Construing and applying Hill's Or. Laws, § 271, providing that a conveyance of real property or any interest therein shall be void as against the lien of a judgment, unless such conveyance be recorded at the time of docketing such judgment, or unless it be recorded within the time after its execution provided by law, as between conveyances for the same real property, it is held that in order for a judgment lien to have precedence over a prior unrecorded deed or mortgage, it must have been taken or acquired in good faith without notice or knowledge of such prior unrecorded conveyance or mortgage, and one who claims such priority must show that the deed or mortgage was unrecorded at the time he in good faith acquired his judgment, it not being sufficient to show that he had no knowledge of such deed or mortgage. *Laurent* v. *Lanning*, 32 Or. 11 (51 Pac. Rep. 80).

Sec. 492. Judgment liens—Duration. In North Carolina the lien of a judgment expires at the end of ten years from the date of docketing. *McCaskill* v. *Graham*, 121 N. C. 190 (28 S. E. Rep. 264). Under Neb. Code Civ. Proc., § 482, a judgment ceases to be a lien on the land of the judgment debtor after five years, if execution is not sued out within that time. *Cotton* v. *First Nat. Bank*, 51 Neb. 751 (71 N. W. Rep. 711). A valid levy of a foreign execution on land of the debtor has the effect of extending the lien of the judgment to the land seized, and the lien is not limited in duration to the time the writ has to run, but may be preserved and continued in force as long as the judgment remains unsatisfied and is not allowed to become dormant, in like manner that the lien of the judgment on land in the county where rendered may be. Ohio Rev. Stat., §§ 5874, 5875, 5880,

applied. *Wheeling, L. E. & P. Coal Co.* v. *First Nat. Bank*, 55 O. St. 288 (45 N. E. Rep. 630). A lien obtained by such a levy is not waived or abandoned by suing out another execution on the judgment, and causing it to be levied on the same lands. *Mason* v. *Hull*, 55 O. St. 256 (45 N. E. Rep. 682).

Sec. 493. Equitable liens. The value of material sold to a husband on credit, and erected by him into a building, which building is thereafter exchanged by him for other property, and such property in turn converted into land, the title to which is put in his wife's name, in fulfillment of an agreement to purchase it with the wife's funds, theretofore intrusted to the husband for such purpose, cannot be pursued into such land, and an equitable lien impressed therefor upon the same. *McAdow* v. *Hassard*, 58 Kan. 171 (48 Pac. Rep. 846). Where, upon the execution of a deed to him, a purchaser delivers it to a third person as collateral security for money furnished by the latter to such purchaser with which to erect buildings on the premises, the transaction constitutes a parol declaration of a trust, accompanying the transmission of the legal title which is not subject to the statute of frauds, and the purchaser cannot demand a delivery of the deed to him until the equitable lien created by the delivery to the third party has been discharged. *First Nat. Bank* v. *Fries*, 121 N. C. 241 (28 S. E. Rep. 350; 61 Am. St. Rep. 668).

Sec. 494. Legacies as a charge on land. Legacies are not a charge upon a testator's real estate unless such intention is expressed in the will, or can be implied from the language used; and in the absence of latent ambiguity, parol evidence is not admissible to show facts necessitating the creation of such a charge. *Wentworth* v. *Read*, 166 Ill. 139 (46 N. E. Rep. 777); *McGlaughlin* v. *McGlaughlin's Legatees*, 43 W. Va. 226 (27 S. E. Rep. 378). Where a testator has devised land to his executor, the income of which is to be applied to the payment of the support and funeral expenses of a designated person, these items become a charge upon the land for which a lien may be enforced against it. *Clark* v. *Marlow*, 149 Ind. 41 (48 N. E. Rep. 359). Particular case in which a legacy is held to be a lien on land. *Smith* v. *Jackman*, 115 Mich. 192 (73 N. W. Rep. 228).

Sec. 495. Lis pendens statutes applied and construed. The *lis pendens* statute of Indiana (Rev. Stat. 1894, § 327) requiring the filing of a *lis pendens* notice in the clerk's office in order for any action to enforce any lien upon, or right to, or interest in any real estate upon any claim not founded upon an instrument executed by the party having the record title to such real estate, to constitute constructive notice of the pendency of such suit, is held to apply to an action to enforce a vendor's lien. *Pennington* v. *Martin*, 146 Ind. 635 (45 N. E. Rep. 1111). The court say: "Statutes of this class are numerous and have often been construed by the courts. The decisions are uniform in holding that 'the *lis pendens* acts limit the method of creating *lis pendens*. They abrogate the common law upon the subject; and, if the statutory mode be not followed, there can be no *lis pendens* as to third parties.' Benn. Lis Pend. § 321; *Bensley* v. *Water Co.*, 13 Cal. 307 (73 Am. Dec. 575); *Corwin* v. *Bensley*, 43 Cal. 263; *Jorgenson* v. *Railway Co.*, 25 Minn. 206; *Arnold* v. *Casner*, 22 W. Va. 459; *Burroughs* v. *Reiger*, 12 How. Prac. 171; *Tate* v. *Jordan*, 8 Abb. Prac. 392; *Abadie* v. *Lobero*, 86 Cal. 391; *Hammond* v. *Paxton*, 58 Mich. 393 (25 N. W. Rep. 321); 13 Am. & Eng. Enc. Law, p. 895. In the authority last cited, the rule is stated that, 'where no notice of *lis pendens* is filed or recorded, and no actual notice to the party is shown, there is no binding *lis pendens*.' See also *Smith* v. *Gale*, 144 U. S. 509, 526 (12 Sup. Ct. Rep 674)." A *lis pendens* notice provided for by How. Ann. Mich. Stat. § 6619, takes effect from the time of its filing and is notice to the whole world of the claim made in the bill. *Lockwood* v. *Noble*, 113 Mich. 418 (71 N. W. Rep. 856). Wash. Laws 1893, p. 412, § 17, which provides for the filing of a *lis pendens* and declares that every person whose conveyance or incumbrance is subsequently executed or subsequently recorded shall be deemed a subsequent purchaser or incumbrancer, and shall be bound by all proceedings taken after the filing of such notice, applies only to persons whose conveyance or incumbrance is taken from the parties to the suit and not from strangers to the record. *Johnson* v. *Irwin*, 16 Wash. 652 (48 Pac. Rep. 345).

Sec. 496. Pendente lite purchasers. A purchaser of property pending litigation for its recovery, takes subject to an attorney's lien given by Ga. Code, § 1989. *Lovett* v. *Moore*, 98 Ga. 158 (26 S. E. Rep. 498). Persons who acquire liens pending foreclosure proceedings are as much bound by a decree rendered therein as if made parties thereto, *Warford* v. *Sullivan*, 147 Ind. 14 (46 N. E. Rep. 27); and one purchasing from a mortgagor after a suit to foreclose a mortgage has been begun, takes subject to the decree of foreclosure and the rights of a purchaser at a foreclosure sale thereunder. *Hibernia Sav. & L. Soc.* v. *Lewis*, 117 Cal. 577 (47 Pac. Rep. 602). A conveyance, *pendente lite*, does not affect the result of the suit where the grantee is not made a party. *Mealy* v. *Lipp*, 91 Tex. 182 (42 S. W. Rep. 544). A person who acquires title at a partition sale to effect a settlement between plaintiffs of their rights and interests in property in suit takes their position and standing in the litigation, in point of fact, notwithstanding he fails to have himself made a party thereto; that is to say, his acquisition gives him no advantage, and does not affect the rights of the defendants and appellees. *Dufossat* v. *Fontenot*, 49 La. 898 (22 So. Rep. 46). A *lis pendens* is sufficient notice to one who buys timber on the land of the rights of the complainant in the suit. *Alliance Trust Co.* v. *Nettleton Hardwood Co.*, 74 Miss. 584 (21 So. Rep. 896; 60 Am. St. Rep. 531; 36 L. R. A. 155). Where judgments are docketed or deeds of trust recorded, or liens otherwise acquired, and a chancery suit to enforce the same is pending, there need not be any notice of the pendency of such suit, under W. Va. Code 1891, Ch. 139, § 13, to bind one purchasing after the docketing of such judgment or recordation of such deeds of trust or liens. They are *pendente lite* purchasers under the common law rule. *Shumate's Ex'rs* v. *Crockett*, 43 W. Va. 491 (27 S. E. Rep. 240). Although under Minn. Gen. Stat. 1894, § 5267, an action is, after final judgment, still under the control of the court for the purposes of that section, yet the action is not pending (at least after the time for appealing has expired), so as to render a purchaser, from a party to the action, of property the title of which is affected by the judgment, a purchaser *pendente lite*. Such purchaser must be made a party to or given notice of any

application under that section to vacate or modify the judgment, at least when the party making the application has notice, actual or constructive, of the transfer of interest; and, if he is not made a party to or given notice of such application, the setting aside or modification of the judgment will be, as to him, void and inoperative to affect his title. *Aldrich* v. *Chase*, 70 Minn. 243 (73 N. W. Rep. 161).

Sec. 497. Miscellaneous notes—Statutes construed. A party may, by agreement, give a lien on property not yet acquired by him, and such lien attaches when the party agreeing to give it acquires the property. Cal. Civ. Code, § 2883. *Kreling* v. *Kreling*, 118 Cal. 413 (50 Pac. Rep. 546). A probate court has no power to direct the distribution of an estate to the decedent's heirs charged with a lien in favor of the administrator, on account of money expended by him for the benefit of the estate, *Huston* v. *Becker*, 15 Wash. 586 (47 Pac. Rep. 10); or for money due him for his fees. *In re Sour's Estate*, 17 Wash. 675 (50 Pac. Rep. 587). Where the payee of a note executed a bond to the payor, agreeing to convey certain lands upon his payment of the note, it is held that an assignee of the note acquires a lien on the land. *National Bank of Commerce* v. *Lock*, 17 Wash. 528 (50 Pac. Rep. 478; 61 Am. St. Rep. 928). Ala. Code, §§ 265, 279, 284–286, construed and applied—lien of bond of probate judge —additional bond — intermediate mortgage — subrogation. *Randolph* v. *Billing*, 115 Ala. 682 (22 So. Rep. 468). N. Dak. Rev. Codes, § 4845, construed and applied—enforcement of seed grain lien—liability of purchaser of property covered by. *Black* v. *Minneapolis & N. El. Co.*, 7 N. Dak. 129 (73 N. W. Rep. 90). S. Dak. Comp. Laws, §§ 5490–5493, construed and applied—sufficiency of complaint to enforce seed grain lien—sufficiency of description of property in notice of lien. *First Nat. Bank* v. *Peavy Elevator Co.*, 10 S. Dak. 167 (72 N. W. Rep. 402).

Sec. 498. Statutes amended and new statutes. Ala. Code (1896), §§ 1920–1922—lien of judgments—filing of transcript—amended, Laws, 1898–99, p. 84. La. Laws 1899, p. 215, provides for filing *lis pendens* in actions affecting immovable

property situated in cities of more than 50,000 inhabitants. Minn. Laws 1899, p. 122, provides that in case of dispute as to what county land is located in, *lis pendens* may be filed in each county. Ohio Rev. Stat. § 5391—restricting lien of judgment to two-thirds of value of land—amended Laws 1898, p. 284. Utah Rev. Stat. 1898, § 3198,—docketing judgment —lien for eight years—filing transcript in other counties—amended, Laws 1899, p. 84. Va. Code, § 3567—time for which judgment is to be a lien on real estate—amended, Laws 1897–98, p. 507.

MARRIED WOMEN.

EPITOME OF CASES.

Sec. 499. Contracts and conveyances—Power of abandoned wife at common law. A contract of guaranty, executed by a married woman in the state of her residence, the law of which does not permit her to make such a contract, does not become valid by its delivery in another state by her husband whose agency is created in the state where the contract was executed. *Appeal of Freeman*, 68 Conn. 533 (37 Atl. Rep. 420; 57 Am. St. Rep. 112; 37 L. R. A. 452). In Michigan it is held that a wife is not liable upon a covenant in her husband's deed. *Webb* v. *Holt*, 113 Mich. 338 (71 N. W. Rep. 637). The contrary is held in Minnesota. *Security Bank* v. *Holmes*, 68 Minn. 538 (71 N. W. Rep. 699).

"At the common law, if the husband has abjured the realm, or was an alien residing continuously abroad, these circumstances invested the wife with the protection and powers incident to a *feme sole*." And the same rule has been extended and applied when the husband resided without the state of the wife's residence, he having deserted her. *Buford* v. *Adair*, 43 W. Va. 211 (27 S. E. Rep. 260; 64 Am. St. Rep. 854). Citing. *Abbot* v. *Bayley*, 6 Pick. 89; *Gregory* v. *Pierce*, 4 Metc. (Mass.) 478; *Rose* v. *Bates*, 12 Mo. 30; *Gallaher* v. *Delargy*, 57 Mo. 29; *Rhea* v. *Rhenner*, 1 Pet. 105; *Gregory* v. *Paul*, 15 Mass. 31; *Cornwall* v. *Hoyt*, 7 Conn. 427; *Arthur* v. *Broadnax*, 8 Ala. 557 (37 Am. Dec. 707);

Roland v. *Logan*, 18 Ala. 307; *Starrett* v. *Wynn*, 17 Serg. & R. 130 (17 Am. Dec. 654).

Sec. 500. Estoppels applied to married women. Where a married woman has executed a note and mortgage to secure the payment of a sum which, from the recitals in such note and mortgage, appears to have been loaned to her, and upon the faith of her separate estate, she is not entitled to impeach the transaction by showing that the papers were executed to secure the payment of her husband's debts, and not her own, unless she alleges in her plea, and proves, that at the time of their execution the lender knew that the transaction was merely colorable, and was a scheme or device by which her own property was pledged to the payment of the debt of her husband. *Temples* v. *Equitable Mortg. Co.*, 100 Ga. 503 (28 S. E. Rep. 232; 62 Am. St. Rep. 326). In South Carolina it is held that a married woman is estopped to deny recitals in her note and mortgage that they are for the benefit of her separate estate, as against an innocent assignee of them for value before maturity and without notice. *White* v. *Goldsberg*, 49 S. C. 530 (27 S. E. Rep. 517). A married woman who gives to one holding her separate estate as trustee, written authority to sell and convey the same and joins with him in the deed, will be estopped to assail the title of a subsequent purchaser of the property on account of misapplication of the purchase price of which she had notice at the time of the transaction but failed to disclose it to the public. *Harris* v. *Smith*, 98 Tenn. 286 (39 S. W. Rep. 343). In Texas it is held that the execution of a deed by a married woman, which is invalid because her husband does not join her in its execution and her receipt for purchase money, do not estop her or her privies from assailing the validity of the deed, even as against a subsequent purchaser without notice of her coverture. *Daniels* v. *Mason*, 90 Tex. 240 (38 S. W. Rep. 161; 59 Am. St. Rep. 815). In West Virginia it is held that a married woman cannot even by fraudulent conduct, be barred under the principle of *estoppel in pais* from asserting her title to land, although it be her separate estate. *Williamson* v. *Jones*, 43 W. Va. 652 (27 S. E. Rep. 411; 64 Am. St. Rep. 891; 38 L. R. A. 694)

Sec. 501. Equities of married women as against husbands' creditors. A wife who permits her husband to take and hold the legal title to real estate purchased with her money, cannot assert her ownership to the injury of his creditors. *Roane* v. *Hamilton*, 101 Ia. 250 (70 N. W. Rep. 181); *Township of Maple Valley* v. *Foley*, 118 Mich. 622 (71 N. W. Rep. 1086); *Holter* v. *Wassweiler*, 19 Mont. 169 (47 Pac. Rep. 806). In Missouri it is held that where a married woman permits her husband to hold the legal title to lands purchased with her money, not knowing the effect thereof, or that the husband was obtaining credit on the faith of his ownership, she is not guilty of any fraud, so as to invalidate, as to his creditors, a subsequent conveyance of the land to her by her husband. *Alkire Grocery Co.* v. *Ballenger*, 137 Mo. 869 (38 S. W. Rep. 911). Where the wife, who was the owner of an equitable undivided interest in land conveyed to her husband, caused him to convey such interest to her before his debtor acquired a judgment against him, she can assert her title as against such debtor, although he extended credit to the husband upon the faith of his ownership of the land, where it appears that she did not authorize the husband to take title in his own name alone or do anything to mislead the creditor or warrant him in believing the land belonged to the husband. *Bell* v. *Stewart*, 98 Ga. 669 (27 S. E. Rep. 158). To the same effect is the case of *Hill* v. *Meinhard*, 39 Fla. 111 (21 So. Rep. 805). Where a wife asserts title to crops raised by her husband on her land and in his possession, as against his creditors she has the burden of showing that the land is her separate real estate and that the crops belong to her, which is not discharged by her merely showing a deed of the land to her. *Eavenson* v. *Pownall*, 182 Pa. St. 587 (38 Atl. Rep. 470).

SEPARATE REAL ESTATE.

[In Vol. II, §§ 381-428; Vol. III, §§ 470-493; Vol. IV., §§ 466-492; Vol. V, §§ 479-508, will be found a compilation of the statutes and decisions of the several states and territories on the subject of Separate Real Estate of Married Women. Below we give such amendments, changes and additional constructions as have been made.]

Sec. 502. Alabama. (See Vol. II, § 381; Vol. III, § 470; Vol IV, § 466; Vol. V, § 479.) A husband's mortgage upon his wife's land to

secure his debt is void. *Farmer* v. *American Mortg. Co.*, 116 Ala. 410 (22 So. Rep. 426). Under Code, § 2348, a deed signed and acknowledged by a married woman and her husband, is not sufficient to convey her land where the husband's name nowhere appears in the body of the instrument and there is nothing in it to indicate an intention on his part to become a grantor. *Johnson* v. *Goff*, 116 Ala. 648 (22 So. Rep. 995). Under Code 1886, § 2348, and Act Feb. 21, 1893, it is held that a woman over eighteen years of age, whose husband has abandoned her, may execute a valid mortgage of her property although she is not twenty-one years old. *Knight* v. *Colman*, 117 Ala. 266 (22 So. Rep. 974). Under Code, § 2349, a conveyance by a wife of her separate estate directly to her husband is valid in the absence of any abuse of the confidential relation; but she cannot mortgage her real estate to secure his debt. *Osborn* v. *Cooper*, 113 Ala. 405 (21 So. Rep. 320). A note on which a wife becomes surety for her husband, and a mortgage by her of her statutory separate estate to secure the debt, is void, although the money procured on such obligation was used to improve her land. *Richardson* v. *Stephens*, 114 Ala. 238 (21 So. Rep. 949).

Sec. 503. Arkansas. (See Vol. II, § 383; Vol. III, § 471; Vol. IV, § 467; Vol. V, § 480.) The statute giving married women exclusive control of their separate property, does not repeal the law exempting them from the operation of the statute of limitations. Sand. & H. Ark. Dig., ch. 105; § 4815, construed and applied. *Rowland* v. *McGuire*, 64 Ark. 412 (42 S. W. Rep. 1068)

Sec. 504. Delaware. (See Vol. II, § 388.) Under act April 9, 1873, § 9, as amended by act Feb. 27, 1879, which provides that "in any case a married woman above the age of twenty-one years may give bond with or without power of attorney, just as if she were a *feme sole*," it is held that a married woman may execute a bond to secure the debt of another and that an instrument under seal properly signed, by which she obligates herself to pay another a sum of money named, is a bond within the meaning of the statute. Where such bond is executed by the husband and wife with the seal affixed opposite his signature, in the absence of proof to the contrary, it will be presumed that the wife adopted the seal. *Warder, Bushnell & Glessner Co.* v. *Stewart*, 2 Marv. (Del.) 275 (36 Atl. Rep. 88).

Sec. 505. Florida. (See Vol. II, § 389; Vol. III, § 475; Vol. IV, § 469) Real estate conveyed by deed to a married woman direct, with words of transfer in the premises, "grant, bargain, sell and convey and confirm unto the said party of the second part (the married woman), and to her heirs and assigns forever, all of the following piece," and a *habendum* and *tenendum* clause, "to have and to hold the above mentioned and described premises, with the appurtenances, and every part thereof, to the said party of the second part and to her heirs and assigns forever," is the separate statutory property of such married woman. *Hill* v. *Meinhard*, 39 Fla. 111 (21 So. Rep. 805).

Sec. 506. Georgia. (See. Vol. II, § 390; Vol. III, § 476; Vol. IV, § 470; Vol. V, § 483.) A separate estate may be created by a conveyance to a married man "as trustee for his wife." *Evans* v. *Bethune*, 99 Ga. 582 (27 S. E. Rep. 277). She cannot bind her separate estate for the debts of her husband, nor can she become the surety for any one, and her conveyance for any such purpose will not bar an action by her to recover the property. *Riviere* v. *Ray*, 100 Ga. 626 (28 S. E. Rep. 391). A contract to purchase the husband's land in which she agrees to pay a part of the consideration to his creditor, is not a contract of suretyship within the prohibition of Code, § 1783. *Strickland* v. *Gray*, 98 Ga. 667 (27 S. E. Rep. 155). She may estop herself by her recitals in her note and mortgage from asserting that she executed them as surety for her husband. *Temples* v. *Equitable Mortg. Co.*, 100 Ga. 503 (28 S. E. Rep. 232; 62 Am. St Rep. 326).

Sec. 507. Indiana. (See Vol. II, § 393; Vol. III, § 479; Vol. IV, § 472; Vol. V, § 485.) A wife may by her separate deed release all her interest in land duly conveyed by the guardian of her husband, under the direction of a court of competent jurisdiction. Laws 1899, p. 14. Where the consideration of notes executed by her husband and secured by a mortgage on her land was the issuance of corporate stock by the mortgagee to the husband, none of which was received by the wife, the contract is, as to her, a contract of suretyship, and its nature is not changed by the fact that the notes were payable in bank and subsequently passed to innocent purchasers. *Leschen* v. *Guy*, 149 Ind. 17 (48 N. E. Rep. 344). For application of the statute forbidding contracts of suretyship, to a mortgage upon land held by the entireties, see *Harrison Bld. & Dep. Co.* v. *Lackey*, 149 Ind. 10 (48 N. E. Rep. 254); *Grzesk* v. *Hibberd*, 149 Ind. 354 (48 N. E. Rep. 361).

Sec. 508. Kentucky. (See Vol. II, § 396; Vol. III, § 480; Vol. IV, § 474; Vol. V, § 486.) The separate real estate of a married woman cannot be sold to pay a debt for rent of a hotel leased by her solely for profit. *Crow* v. *Shackett*, Ky. (38 S. W. Rep. 692). Land conveyed to a married woman may be subjected to the payment of the unpaid purchase price. *Adams* v. *Feeder*, Ky. (41 S. W. Rep. 275). Under Gen. Stat., ch. 52, art. 2, § 2, a wife's real estate may be subjected to the payment of a note executed by her for supplies to enable her and her husband to make a crop for the support of themselves and family. *Allen* v. *Long*, Ky. (41 S. W. Rep. 17).

Sec. 509. Louisiana. (See Vol. II, § 397; Vol. IV, § 475; Vol. V, § 487.) The certificate of the judge authorizing a married woman to borrow money, and mortgage her property for her separate use and benefit shifts the burden of proof as to the character of the engagement from the creditor to the wife. The mere fact that a married woman has been authorized to borrow a fixed amount does not necessarily bind her, if she subsequently undertakes to bind herself for that amount. Where,

on the face of an act of mortgage by the wife, knowledge was brought home to the mortgagee that the money about to be borrowed was intended to be used for the purpose of cultivating a plantation carried on by the husband for the benefit of the community, the wife will not be bound. *Berwick* v. *Frere*, 49 La. 201 (21 So. Rep. 692). As to the power of a married woman to convey or mortgage her real estate, see *Johnson* v. *Pessou*, 49 La. 109 (21 So. Rep. 177).

Sec. 510. Maryland. (See Vol. II, § 399; Vol. III, § 481; Vol. IV, § 476.) "Married women shall hold all their property, of every description, for their separate use, as fully as if they were unmarried, and shall have all the power to dispose of by deed, mortgage, lease, will or any other instrument that husbands have to dispose of their property, and no more; provided, that no disposition of her real or personal property, or any portion thereof by deed, mortgage, bill of sale or other conveyance, shall be valid if made by a married woman under eighteen years of age, unless her husband shall unite therein." Laws 1898, p. 1082, § 4.

Sec. 511. Michigan. (See Vol. II, § 401; Vol. III, § 482; Vol. V, § 489.) She may bind herself by an agreement to pay her husband's debts, executed to his creditors, to prevent their attacking for fraud, a conveyance of land made by him to her. *Whelpley* v. *Stroughton*, 112 Mich. 594 (70 N. W. Rep. 1098).

Sec. 512. Minnesota. (See Vol. II, § 402; Vol. IV, § 477; Vol. V, § 490.) Property of a married woman is not liable for her husband's debts, but it may be subjected to the payment for necessaries furnished to, and used by the family. Laws 1899, p. 415.

Sec. 513. Missouri. (See Vol. II, § 404; Vol. III, § 483; Vol. IV, § 479; Vol. V, § 492.) A wife consenting to her husband holding in his own name the legal title to lands purchased with her money in ignorance of the effect thereof, does not thereby show such assent to the use of her money for his benefit as to raise the presumption that it has been reduced to his possession, under Rev. Stat. 1889, § 6869. *Alkire Grocery Co.* v. *Ballenger*, 137 Mo. 369 (38 S. W. Rep. 911).

Sec. 514. Nebraska. (See Vol. II, § 406; Vol. III, § 484; Vol. IV, § 481.) A married woman's conveyance of her separate property, not her homestead, is valid between the parties, though not acknowledged. She may pledge her separate estate to secure her husband's debts, but there must be a new consideration to sustain a mortgage to secure his antecedent debts. The making of further advances to the husband is a sufficient consideration for such a mortgage, but the repayment of the subsequent advances does not discharge the mortgage. *Linton* v. *Cooper*, 53 Neb. 400 (73 N. W. Rep. 731). She may mortgage her separate estate to secure the debt of another. *Holmes* v. *Hull*, 50 Neb. 656 (70 N. W. Rep. 241). As to her liability as surety on a note, see *Union Stock Yards Nat. Bank* v. *Coffman*, 101 Ia. 594 (70 N. W. Rep. 693).

Sec. 515. New Hampshire. (See Vol. II, § 408.) A married woman of full age may convey her real estate. She may convey her real estate directly to her husband. Laws 1899, p. 254.

Sec. 516. New Jersey. (See Vol. II, § 409; Vol. IV, § 482; Vol. V, § 494.) "Notwithstanding that a married woman is restrained from anticipation, the court of chancery may, if it think fit, where it appears to the court to be for her benefit, by order or decree, with her consent, bind her interest in any property, or authorize her or her trustees to assign or convey the same." Laws 1898, p. 370. Construing §§ 5 and 14 of the married woman's act (see Vol. II, § 409), it is held that a married woman's contract to convey her real estate cannot be specifically enforced unless such contract be executed and acknowledged with all the formalities required for a deed by her. See Vol I, § 85. *Corby* v. *Drew*, 55 N. J. Eq. 387 (36 Atl. Rep. 827). She may embark in business as the controlling stockholder in a corporation which employs her husband as manager, and its undivided earnings represented by her shares of stock, belong to her, though due in part to the skillful management of the business of the corporation by her husband. *Taylor* v. *Wands*, 55 N. J. Eq. 491 (37 Atl. Rep. 315; 62 Am. St. Rep. 818).

Sec. 517. North Carolina. (See Vol. II, § 412; Vol. III, § 485; Vol. IV, § 484; Vol. V, § 496.) Under Code, § 1826, she may bind her separate estate by her own contract for supplies furnished to her tenant. *Bazemore* v. *Mountain*, 121 N. C. 59 (28 S. E. Rep. 17). Her deed with the written consent of her husband thereto, required by Const., art. 10, § 6, does not convey title where it was not proved and recorded until after her death. *Green* v. *Bennett*, 120 N. C. 394 (27 S. E. Rep. 142). When the wife mortgages her separate property to secure a debt of the husband, the relation she sustains to the transaction in reference to said property, is that of surety. *Smith* v. *Old Dominion Bldg. & L. Ass'n.* 119 N. C. 257 (26 S. E. Rep. 40). As to rights and liabilities of married woman mortgaging her separate proberty to secure the debt of her huspand, see *Sherrod* v. *Dixon*, 120 N. C. 60 (26 S. E. Rep. 770.)

Sec. 518. North Dakota. (See Vol. 5, § 497.) "The wife after marriage has with respect to property, contracts and torts the same capacity and rights and is subject to the same liabilities as before marriage, and in all actions by or against her she shall sue and be sued in her own name." Laws 1899, p. 140.

Sec. 519. Pennsylvania. (See Vol. II, § 416; Vol. III, § 487; Vol. IV, § 485; Vol. V, § 499.) Under act of 1893 (see Vol. III, § 487) it is held that she cannot bind herself by contract of suretyship although the application of the principal be for the benefit of her separate estate. *Wiltbank* v. *Tobler*, 179 Pa. St. 146 (37 Atl. Rep. 188).

Sec. 520. South Carolina. (See Vol. II, § 418; Vol. III, § 489; Vol. IV, § 487; Vol. V, § 501.) S. C. Const., art. 14, § 8, does not

repeal the act of 1795 (5 Stat., p. 257), prescribing the mode by which a married woman might release her estate of inheritance in real estate. *Brown* v. *Peachman*, 49 S. C. 546 (27 S. E. Rep. 520).

Sec. 521. Tennessee. (See Vol. II, § 420; Vol. III, § 490; Vol. IV, § 488; Vol. V, § 502.) A judgment against a husband and wife may be satisfied out of her property. *Adcock* v. *Mann*, Tenn. (38 S. W. Rep. 99). Where a married woman is sued and she fails to plead her coverture, the judgment is not void and may be satisfied by execution against her general estate. But in order to charge her separate estate, she must expressly agree and stipulate to do so for the special debt sought to be charged, and a general judgment obtained against her during coverture does not bind her separate estate even after the coverture ceases. *Woodfolk* v. *Lyon*, 98 Tenn. 269 (39 S. W. Rep. 227). Where a creditor seeks to enforce a judgment against the separate estate of a married woman on a debt contracted during coverture, he must, in his proceedings, point out such separate estate which she holds at that time. *Flanagan* v. *Oliver Finnie Grocery Co.*, 98 Tenn. 599 (40 S. W. Rep. 1079).

Sec. 522. Texas. (See Vol. II, § 421; Vol. III, § 491; Vol. IV, § 489; Vol. V, § 503.) A valid conveyance of a married woman's separate estate executed by her husband under a power of attorney from her, may be subsequently ratified and confirmed by an instrument jointly executed by them for that purpose, the rights of third persons not having intervened. *Scales* v. *Johnson*, Tex. Civ. App. (41 S. W. Rep. 828). It is held that the execution of a deed by a married woman, which is invalid because her husband does not join her in its execution and her receipt for purchase money, do not estop her or her privies from assailing the validity of the deed, even as against a subsequent purchaser without notice of her coverture. *Daniels* v. *Mason*, 90 Tex. 240 (38 S. W. Rep. 161; 59 Am. St. Rep. 815). With the consent of her husband, she may waive the invalidity of a condemnation of her separate property for public use by accepting the compensation awarded, and title passes without a conveyance executed by her in accordance with Rev. Stat. 1895, art. 635. *City of San Antonio* v. *Grandjean*, 91 Tex. 430 (41 S. W. Rep. 477). A wife executing a note with her husband as his security and mortgaging her land to secure its payment, has the same rights as any other surety and is released upon extension of the time of payment given him without her consent. *Angel* v. *Miller*, 16 Tex. Civ. App. 679 (39 S. W. Rep. 1092). A general judgment for damages rendered against a husband and wife, as cotenants, on account of ousting their cotenants, may be levied on the separate property of the wife. *Taylor* v. *Stevens*, 17 Tex. Civ. App. 36 (42 S. W. Rep. 1048).

Sec. 523. Vermont. (See Vol. II, § 423.) Section 2, Act No. 49, Laws 1896, p. 42, set out in Ballards' Law Real Property, Vol. V, § 506, has been amended so as to read as follows: "Said Court of Chancery, in its discretion, upon the petition of any party in interest, may also

confirm and validate any deed of the real estate of a married woman, heretofore or hereafter made by her, in which the husband did not join, and may order and compel the husband to execute and deliver all instruments necessary to confirm and validate said deed." Laws 1898, No. 55.

Sec. 524. Virginia. (See Vol. II, § 424; Vol. III, § 492; Vol. IV, § 490; Vol. V. § 504.) An adult married woman may sue in her own name. Laws 1897–98. p. 744. Va. Laws 1893–94, p. 489, applied—husband as a party to an action brought to recover her separate estate. *West* v. *Adams*, Va. (27 S. E. Rep. 496).

Sec. 525. West Virginia. (See Vol. II, § 526; Vol. III, § 493; Vol. IV, § 491; Vol. V, § 508.) Where a married woman owns both personal and real estate, the latter cannot be subjected to the payment of her debts until the former is exhausted. *Fitzgerald* v. *Phelps & Bigelow Windmill Co.*, 42 W. Va. 570 (26 S. E. Rep. 315). The wife, or she and her husband may maintain trespass for damages for both possession and the inheritance, where there is a conveyance of the land to a trustee to permit her to have possession and use of it, though she is vested with only equitable title. *Clay* v. *City of Albans*, 43 W. Va. 539 (27 S. E. Rep. 368; 64 Am. St. Rep. 883).

Sec. 526. Wisconsin. (See Vol. II, § 427; Vol. IV, § 492.) A woman's will is not revoked by her subsequent marriage. *In re Lyon's Will*, 96 Wis. 339 (71 N. W. Rep. 362; 65 Am. St. Rep. 52). She is not liable on her note given as security for her husband, where it has no reference to her separate estate or business. *Mueller* v. *Wiese*, 95 Wis. 381 (70 N. W. Rep. 485).

MECHANICS' LIENS.

EPITOME OF CASES.

Sec. 527. Construction of mechanics' lien statutes—Effect of change of statute. In determining whether a mechanic's lien attached, the statute should be strictly construed; but after the lien has attached, a liberal construction should be put upon the statute for the purpose of fulfilling its objects. *Smalley* v. *Northwestern Terra-Cotta Co.*, 113 Mich. 141 (71 N. W. Rep. 466). The first proposition is supported by *Glynn* v. *Zabriskie*, 19 R. I. 215 (36 Atl. Rep. 8). A statute materially changing a mechanic's right to have a lien, cannot be applied to contracts entered into before the passage

of the statute. Ill. Laws 1895, p. 228, construed. *Andrews & Johnson Co.* v. *Atwood*, 167 Ill. 249 (47 N. E. Rep. 887). See Ballards' Law Real Prop., Vol. V, § 509. The statute will not be applied to contracts made after its passage by second subcontractors, where the subcontractors' contract with the original contractor was made before the passage of the statute. *Pfeiffer* v. *People*, 170 Ill. 347 (48 N. E. Rep. 979). A statute (N. J. Act, March 14, 1895) shortening the time within which a lien claim may be filed, is held not to apply to a case where the work for which the lien is claimed was all done at the time of the passage of the statute. *Barnaby* v. *Bradley & Currier Co.*, 60 N. J. L. 158 (37 Atl. Rep. 764).

Sec. 528. Estate or property subject to the lien. In South Dakota it is held that a homestead is not subject to a mechanic's lien. S. Dak. Comp. Laws, §§ 2452, 5126, 5127; Laws 1890, ch. 86, construed. *Fallihee* v. *Wittmayer*, 9 S. Dak. 479 (70 N. W. Rep. 642). The lands of one upon which a constructed house is moved for a mere temporary resting place, cannot be subjected to a lien for materials previously furnished for its construction. Cal. Code Civ. Proc., §§ 1183, 1185, 1192, construed and applied. *Fresno Loan & Sav. Bank* v. *Husted*, Cal. (49 Pac. Rep. 195). Where one who furnishes materials for improvements is led to believe that the party to which they are furnished has a title or interest to which a mechanic's lien will attach, and he has not, but obtains it while the contract is being performed, the lien may be enforced against such title. *Flœte* v. *Brown*, 104 Ia. 154 (73 N. W. Rep. 483; 65 Am. St. Rep. 434).

Sec. 529. Public property—Bond of contractor. A mechanic's lien cannot be acquired on public property unless the statute creating the lien expressly so provides. *Hicks* v. *Roanoke Brick Co.*, 94 Va. 741 (27 S. E. Rep. 596). This principle applies to a public school house erected in accordance with public law. *Townsend* v. *Cleveland Fire Proofing Co.*, 18 Ind. App. 568 (47 N. E. Rep. 707); *Whiteside* v. *School Dist. No. 5*, 20 Mont. 44 (49 Pac. Rep. 445). Citing, *Hovey* v. *Town of East Province*, 17 R. I. 81 (20 Atl. Rep. 205; 9

L. R. A. 156); *Mayrhofer* v. *Board of Education*, 89 Cal. 110 (26 Pac. Rep. 646; 28 Am. St. Rep. 451); *Fatout* v. *Commissioners*, 102 Ind. 228 (1 N. E. Rep. 389); *Portland Lumbering & Manuf'g Co.* v. *School District No. 1*, 18 Or. 283 (10 Pac. Rep. 850); *Jordan* v. *Board of Education*, 39 Minn. 299 (39 N. W. Rep. 801). A lien cannot be enforced for materials furnished for the erection of a court house and city hall. *Burlington Mfg. Co.* v. *Board of Court House & City Hall Com'rs*, 67 Minn. 327 (69 N. W. Rep. 1091). In Kentucky it is held that the rule prohibiting the assertion of a mechanic's lien against public property does not prevent a subcontractor from asserting a lien on money in the hands of a city or county due the contractor for the erection of improvements. *Noonan* v. *Hastings*, Ky. (41 S.W. Rep. 32).

Where a bond is given for the faithful performance of a contract for the erection of a public building, the bondsmen, whose undertaking is for the benefit of the state, and not for material men and laborers, are not liable upon their bond to third parties for labor performed or material furnished. Nor can any new and undefined liability be established in such case by implication in behalf of a mere stranger to the contract, who might become incidentally benefitted by its performance. *Montgomery* v. *Spencer*, 15 Utah 495 (50 Pac. Rep. 623). In Indiana it is held that neither an equitable nor a statutory lien can be acquired for materials furnished and used in a public school building; and one furnishing such materials cannot claim the right to be subrogated to the rights of the school commissioners on a bond given to them by the contractor covenanting that he would turn over the building when completed free from liens. *Townsend* v. *Cleveland Fire-Proofing Co.*, 18 Ind. App. 568 (47 N. E. Rep. 707).

Sec. 530. Extent of property affected by the lien. Mining machinery dumped upon the ground and not erected or used in connection with the operation of the mine, is not subject to a mechanic's lien claimed for improvements made on the mine. Cal. Civ. Code, § 661, construed. *Hamilton* v. *Delhi Min. Co.*, 118 Cal. 148 (50 Pac. Rep. 378). A lien can only be enforced for material used and labor performed on the part of a building which stands upon the premises

described in the claimant's lien statement. *Western Cornice Mfg. Works* v. *Leavenworth*, 52 Neb. 418 (72 N. W. Rep. 592). Where the property described in a lien claim is an ordinary town lot, a finding by the court that "all of such realty is necessary for the convenient use and enjoyment of said building," will be held equivalent to a finding that it was necessary for the "convenient use and occupation" of such building. *Ward* v. *Crane*, 118 Cal. 676 (50 Pac.Rep. 839). Citing, *Tunis* v. *Association*, 98 Cal. 286 (33 Pac. Rep. 63). Where several persons have interest in an enterprise proportionate to their subscription, agree to pay a contractor the amount of their subscription to a fund for the erection of a building, he may enforce a separate and distinct lien upon the undivided interests in the property of each subscriber for the amount subscribed by him. Ala. Code 1886, § 3018, construed and applied. *Hines* v. *Chicago Bldg. & Mfg. Co.*, 115 Ala. 637 (22 So. Rep. 160). Under N. J. Gen. Stat., p. 2066, § 15, the proper extent of the curtilage to which a mechanic's lien may attach, is a matter to be determined by a justice of the supreme court. *American Brick & Tile Co.* v. *Drinkhouse*, 59 N. J. L. 462 (36 Atl. Rep. 1034). N. H. Pub. Stat., ch. 141, § 11, construed and applied—liens for making brick—extent of property affected. *Lavoie* v. *Burke*, N. H. (38 Atl. Rep. 723).

Sec. 531. Extent of property affected by the lien—Enforcement against a railroad. The right to a mechanic's lien given by a statute (S. Dak. Comp. Laws, § 5485), against a railroad, should be enforced against the entire road and not merely one section of it. *Adams* v. *Grand Island & W. C. R. Co.*, 10 S. Dak. 239 (72 N. W. Rep. 577). The court say: "Upon the theory that railroads, by promoting the public welfare, are advantageous to the state as a body politic, and that it is better to suffer mischief peculiar to an individual than an inconvenience which must, of necessity, seriously prejudice the public generally, the view is sustained by the greater number of well-reasoned authorities that no lien can attach to a single section of a railroad. It is well known that the residents and freeholders in the vicinity of our railroads have contributed largely to their construction; and it would be unrea-

sonable to suppose that the legislature ever intended to enact a law by which a subcontractor or any other person may deprive the public of every advantage which railway facilities afford, by the sale on execution of an unseverable section of the road bed, and a conveyance of an absolute title thereof to the purchaser at a foreclosure sale under a mechanic's lien. As public policy forbids the acquisition of a lien upon a part of the railroad, for work done or materials furnished, a contractor who grades a section only of the road cannot file a lien on that section alone. *Applegate* v. *Ernst*, 3 Bush 648 (96 Am. Dec. 272); *Cox* v. *Railroad Co.*, 44 Cal. 18. In construing the Iowa law of which ours is a copy, the United States supreme court held that the word 'improvement,' in contemplation of this statute, means the entire railroad. *Brooks* v. *Railroad Co.*, 101 U. S. 443; *Railway Co.* v. *Wilcox*, 122 Ind. 84 (28 N. E. Rep. 506); *Chapman Valve Mfg. Co.* v. *Oconto Water Co.*, 89 Wis. 264 (60 N. W. Rep. 1004; 46 Am. St. Rep. 830). 'A lien for labor and materials cannot be enforced against that portion or section of a railroad only for which they were furnished. The lien is against the whole road and the whole must be sold' *Knapp* v. *Railway Co.*, 74 Mo. 374. In the case of *Georgia* v. *Atlantic & G. R. Co.*, 3 Woods, 434 (Fed. Cas. No. 5,351) the court say: 'It cannot be supposed that the legislature, in authorizing the construction, and in granting it a franchise for its operation and use, ever intended that execution creditors might levy upon parcels of it, and cut it up into sections, and destroy it as a great public thoroughfare. Such a proposition is preposterous. Suppose a mile of road should be levied on and sold; would the purchaser have a right to fence it in, and take up the rails and cross-ties, and plant it and thereby destroy the railroad? Could this be done without contemning the power of the state by which it was created and made a public highway? We think not.' Mr. Jones, in his treatise on the Law of Liens, at page 1619, ably vindicates the doctrine 'that a railroad is an entirety, and that a lien cannot attach to a section of it'; and, in support of the text numerous authorities are cited."

Sec. 532. Kind of labor or material for which a lien may be claimed. It is held that a lien cannot be claimed by

one employed at a fixed monthly salary to act as a clerk and bookkeeper during the construction of a building and to make himself generally useful. *Nash* v. *Southwick*, 120 N. C. 459 (27 S. E. Rep. 127). Where one who is employed for a year at a fixed monthly salary to perform such services as his employers may direct, performs lienable and nonlienable work indiscriminately upon a building, he cannot enforce a mechanic's lien. *Getty* v. *Ames*, 30 Or. 573 (48 Pac. Rep. 855; 60 Am. St. Rep. 835). A lien may be enforced for material and labor used in the construction of a water tank upon a farm. *Parker Land & Imp. Co.* v. *Reddick*, 18 Ind. App. 616 (47 N. E. Rep. 848). A lien may be claimed for labor and materials furnished in the erection of the apparatus for gas works. Mill. & V. Tenn. Code, § 2789 (Shannon's Code, § 3581), applied. *Bristol-Goodson Elec. L. & P. Co.* v. *Bristol Gas, E. L. & P. Co.*, 99 Tenn. 371 (42 S. W. Rep. 19). Where a contractor is prevented from completing his work by the wrongful interruption of the owner, he is entitled to a lien for the reasonable value of the labor he has performed and material he has furnished, but he cannot have a lien for damages sustained from breach of contract. Neb. Comp. Stat., ch. 54, art. 1, applied. *Pardue* v. *Missouri Pac. R. Co.*, 52 Neb. 201 (71 N. W. Rep. 1022; 66 Am. St. Rep. 489). Where one adjoining owner builds a party wall on the dividing line between his lot and that of his neighbor, under an agreement with the latter that he will pay one-half of the cost of the wall when he shall use it, he cannot enforce a mechanic's lien for one-half of the cost of the wall against his neighbor's lot when he makes use of the wall. *Swift* v. *Calnan*, 102 Ia. 206 (71 N. W. Rep. 233; 63 Am. St. Rep. 443; 37 L. R. A. 462). Particular evidence held sufficient to show that the work done in the "alteration and repair of an old house," constituted the "erection of a dwelling house," so that a lien can be claimed therefor. *Ward* v. *Crane*, 118 Cal. 676 (50 Pac. Rep. 839). For construction of particular contract as to items for which a lien may be claimed, see *Stokes* v. *Green*, 10 S. Dak. 286 (73 N. W. Rep. 100).

Sec. 533. Construction of sidewalk. Construing Ga. Civ. Code, § 2801, providing that "all mechanics of every

sort who have taken no personal security therefor, shall, for work done and material furnished in building, repairing or improving any real estate of their employers, * * * each have a special lien on such real estate," it is held that a mechanic who lays a sidewalk in front of the real estate of his employer, is not entitled to a lien therefor on such real estate. *Seeman* v. *Schultze*, 100 Ga. 608 (28 S. E. Rep. 378). Citing, *Parmlee* v. *Hambleton*, 19 Ill. 615; *Coenen* v. *Staub*, 74 Ia. 82 (36 N. W. Rep. 877; 7 Am. St. Rep. 470). The court say: "The lien is given for building, repairing or improving any real estate, which we think means that the building, repairs or improvements must be upon the real estate itself in order to give a mechanic a lien. The sidewalk of a public street is not upon the real estate of the owner of an adjacent lot. Paving the sidewalk is an improvement to the public street, and facilitates the passage of pedestrians in front of the lot, but it cannot be said in law that it improves the real estate. It is made as much or more for the benefit of the public than it is for the benefit of the owner of the lot. In our opinion, it does not improve the lot any more than does the paving of the street in front thereof. If a mechanic is entitled to a lien for paving the sidewalk, it seems to us that he should also be entitled to a lien for paving the street. Paving is usually regulated largely by the municipal government. It either paves the sidewalk, or requires the owner of the lot to do so. If the city authorities pave it, an assessment is levied against the owner for the cost; if he paves it himself, he pays for it. It does not appear in the record of this case whether the fee of the owner extended to the middle of the street, and included the sidewalk, or whether the fee of the whole street, including the sidewalk, is in the city or state. Under our statute we think this would make no difference, for in neither case would paving the sidewalk be an improvement upon the real estate itself."

Sec. 534. Architect's services. Construing Mass. Pub. Stat., ch. 191, § 1, giving a lien for "labor performed or furnished * * * and actually used in the erection of a building," it is held that the statute does not give a lien for the services of an architect in preparing plans and specifications for a building, but a lien may be enforced by him for

supervising the construction of a building although done in connection with the preparation of the plans and under the same general employment. *Mitchell* v. *Packard*, 168 Mass. 467 (47 N. E. Rep. 118; 60 Am. St. Rep. 404). The court say: "The preparation of plans and specifications is preliminary to the construction of a building, and is often merely tentative. It may or may not be followed by a construction according to the plans. It is seldom that either the external or internal form of a building is determined upon, or its identity is anything more than an indefinite mental conception, until after the plans have been completed. We are of opinion that this professional work of the architect, in bringing into existence the definite form and conception of a building which may be erected if the landowner adopts it, is not 'labor performed or furnished * * * and actually used in the erection' of a building, within the meaning of our statute. We are of opinion that the work of supervision, which if done directly upon the building, and which is partly physical, but, in its more important part, mental, may be the subject of a lien, under our statute, even if done by the same person who prepares the plans as an architect. Where such work is done under an entire contract for a round sum, which covers compensation for other work which is not the subject of a lien, it may be difficult to separate the part of the price which belongs to this work from that which belongs to the other, and in such a conceivable case, it might be impossible to establish a lien for anything. In the present case no sum was agreed upon for the whole or for any part of the petitioner's services, and the judge has found that a certain price is ordinarily allowed in such cases for supervision."

Sec. 535. Labor on mining claim—Statutes construed. N. M. Comp. Laws, § 1520, giving a lien to one "who performs labor in any mining claim," it is held that a lien cannot be enforced under the statute for the services of one employed as manager and superintendent, who does not perform any bodily toil. *Boyle* v. *Mountain Key Min. Co.*, N. M. (50 Pac. Rep. 847). In support of its conclusion the court carefully reviews and cites the following cases: *Mining Co.* v. *Cullins*, 104 U. S. 176; *Smallhouse* v. *Mining*

Co., 2 Mont. 445; *Railway Co.* v. *Baker*, 14 Kan. 54[illegible]; *Railroad Co.* v. *Leuffer*, 84 Pa. St. 171; *England* v. *Piano Co.*, 41 N. J. Eq. 470 (4 Atl. Rep. 807); *Blakey* v. *Blakey*, 27 Mo. 89; *Nelson* v. *Withrow*, 14 Mo. App. 276; *Stryker* v. *Stryker*, 10 Hun. 18; *Foushee* v. *Grigsby*, 12 Bush 76. Cal. Code Civ. Proc., § 1192, construed and applied—liability of one having a partial interest in a mining claim for improvements made on it, on account of failure to post notice that he would not be responsible. *Hamilton* v. *Delhi Min. Co.*, 118 Cal. 148 (50 Pac. Rep. 378).

Sec. 536. Improvements by a vendee. Where the vendor reserves the title until the purchase money is fully paid, a lien for improvements made by a vendee who owes unpaid installments of the purchase price attaches only to his interest, which interest is the value of the property to be conveyed including any improvements placed thereon less the unpaid purchase money, and the rights of such vendor pass to his assignee or grantee. *Mutual Aid Bldg. & L. Co.* v. *Gashe*, 56 O. St. 278 (46 N. E. Rep. 985). Where a vendor retains the deed as security for the price to be paid for the land, as against him, a lien cannot be enforced for improvements made by the vendee before the delivery of the deed, although made with his knowledge. Mass. Pub. Stat., ch. 191, § 1, applied. *Courtemanche* v. *Blackstone Val. St. Ry. Co.*, 170 Mass. 50 (48 N. E. Rep. 937; 64 Am. St. Rep. 27[illegible]. Where an owner of land, combining with a contractor to aid him in a speculation, conveys the land to him, reserving a vendor's lien, and there is an agreement between them for the improvement of the property by the contractor, and its subsequent sale by him and payment of the purchase price, such contractor will be treated as the agent of the vendor in contracting with material men and mechanics for the making of improvements on the lands, within the meaning of Mill & V. Tenn. Code, § 2739; Shannon's Code, § 3531, giving a lien on land for improvements made by special contract of the owner or his agent. Persons entitled to liens under this section are not required to give the thirty days' notice required by Tenn. Laws 1889, ch. 108. *Jonte* v. *Gill*, Tenn. (39 S. W. Rep. 750).

Sec. 537. Improvements by lessee or licensee. A lien for materials or improvements may be enforced against a lessee to the extent of his interest under his lease. *Meek* v. *Parker*, 68 Ark. 367 (38 S. W. Rep. 900; 58 Am. St. Rep. 119). Where a lessor consents to the making of improvements by his lessee his interest may be subjected to a lien therefor, where he fails to give notice disclaiming his liability, as provided for by Cal. Code Civ. Proc., § 1192. *Santa Monica Lum. & Mill Co.* v. *Hege*, 119 Cal. 376 (51 Pac. Rep. 555). Where, pending an action to enforce a lien against a tenant's leasehold estate on account of improvements made by him, the lessor acquires possession in puruance of the terms of the lease and warrant of attorney, the lessee has no interest which can be bound by a subsequent judgment in the proceedings. *Seltzer* v. *Robbins*, 181 Pa. St. 451 (37 Atl. Rep. 567). Where a lease or a contract for a lease provides for the erection of buildings on the premises by the lessee, the cost thereof to be paid to him by his retention of the rents, the lessee becomes the agent of the owner, under Wash. Laws 1893, p. 82, so as to render the property liable for mechanics' liens on account of the construction of such building. *Kremer* v. *Walton*, 16 Wash. 189 (47 Pac. Rep. 288). Where a mechanic at the request of a lessee of a building places in it and attaches to its walls, wainscoting, veneering, door frames and casing, and constructs board partitions, such improvements are not trade fixtures as between them, but a lien may be enforced on the lessee's interest for the labor and materials used by such mechanic. *Matthiesen* v. *Arata*, 32 Or. 342 (50 Pac. Rep. 1015). The mere fact that a lessor agrees with his lessee that he may make alterations and improvements which are to become a part of the premises, is not, of itself, sufficient to render the property liable to a mechanic's lien for any amount that the lessee might expend in such alterations without the lessor's knowledge and without his giving any other consent. *Hankinson* v. *Vantine*, 152 N. Y. 20 (46 N. E. Rep. 292). S. & B. Ann. Wis. Stat., §§ 3314, 3314a, which prohibit the acquisition of a lien when the relation of landlord and tenant exists, applies where there was no agreement in the lease or contemporaneous with it binding the tenant to make the improvements for which the

lien is claimed, although the landlord subsequently consented to their being made and agreed to loan the money to the tenant to aid him in making them. *J. B. Alfree Mfg. Co.* v. *Henry*, 96 Wis. 327 (71 N. W. Rep. 370). Ky. Stat. 1894, § 2466, construed and applied—right of one making improvements for lessee to remove them on forfeiture of the lease. *Schaefer-Meyer Brewing Co.* v. *Meyer*, Ky. (40 S. W. Rep. 685). A lien cannot be enforced for materials furnished to a son, under a contract with him to make improvements on land belonging to his father which he is farming for his father and in making the improvements is acting as a bare licensee, without any authority either express or implied, to bind his father for the purchase price of any material. *Hoag* v. *Hay*, 108 Ia. 291 (72 N. W. Rep. 525).

Sec. 538. Improvements by husband of owner. Where a husband agrees with his wife to make improvements on her land at his own expense, one furnishing him material cannot enforce an equitable lien against the land where the same was charged to the husband. *Poe* v. *Ekert*, 102 Ia. 361 (71 N. W. Rep. 579). The mere fact that a wife knew that the material purchased by her husband on credit was used in the construction of her house, does not furnish ground for enforcing a mechanic's lien against her property for the price of the material where she furnished him the money to pay for it and had no knowledge that it was purchased on credit. *Young* v. *Swan*, 100 Ia. 823 (69 N. W. Rep. 566). Applying Ill. Act, July 1, 1874, § 1, which gives the right to a lien only where labor or material is furnished by a contract with the owner of the land, it is held that a lien cannot be claimed for improvements made under a contract with the husband of the owner of the land where the contract is made under seal in his name. *Walsh* v. *Murphy*, 167 Ill. 228 (47 N. E. Rep. 354). Where a wife gave her husband a power of attorney to execute leases of, and collect rent from her property, and he executed a contract in her name as attorney in fact for the repair of such property, of which contract and the services rendered thereunder she had knowledge, a mechanic's lien may be enforced by the person making the repairs. *Richards* v. *John Spry Lum. Co.*, 169 Ill. 288 (48 N. E. Rep. 68).

Sec. 539. Subcontractors and material men. Payment by the owner to a contractor during the time allowed subcontractors to perfect their liens cannot affect their rights. *Caulfield* v. *Polk*, 17 Ind. App. 429 (46 N. E. Rep. 932). In Massachusetts it is held that when a landowner contracts with a builder to furnish materials and construct a building on his land, he impliedly gives such consent to the employment of laborers as will give them the right to a lien for their services. *Daly* v. *Legate*, 169 Mass. 257 (47 N. E. Rep. 1013). A lien may be enforced for belting for machinery constituting a fixture in a building. N. H. Pub. Stat., ch. 141, §§ 10, 16, construed and applied. *Graton & Knight Mfg. Co.* v. *Woodworth-Mason Co.*, N. H. (38 Atl. Rep. 790). A subcontractor's claim of lien for excavating a cellar cannot include a charge for hauling away the dirt, which labor was performed by a third party who took the dirt for his pay. *Perry* v. *Potashinski*, 169 Mass. 351 (47 N. E. Rep. 1022). The right to a lien for materials sold and delivered to be used in a particular building, is not affected by the fact that they were not used in such building. *Lee* v. *Hoyt*, 101 Ia. 101 (70 N. W. Rep. 95); *Maryland Brick Co.* v. *Dunkerly*, 85 Md. 199 (36 Atl. Rep. 761). One furnishing materials to a contractor with which to complete a sewer for a city, does not thereby acquire a lien on a portion of the contract price due the contractor from the city. *Hicks* v. *Roanoke Brick Co.*, 94 Va. 741 (27 S. E. Rep. 596). Where a contractor forms a partnership after the execution of his contract to erect a house, and the subsequent contracts necessary to the performance of his contract are made with materialmen in the firm name with the knowledge of the landowner, the firm will be treated as principal contractors, within S. & B. Ann. Wis. Stat., § 3315, so as to entitle a subcontractor to a lien. *Van Horn* v. *Van Dyke*, 96 Wis. 30 (70 N. W. Rep. 1067). A lien may be claimed for labor performed by a subcontractor in the preparation of materials intended and designed for use in a particular building and which are so used, although the labor was not performed on the premises where the building was erected. *Daley* v. *Legate*, 169 Mass. 257 (47 N. E. Rep. 1013).

Sec. 540. Subcontractors and material men—How far rights of are affected by payments to, or contracts with the principal contractor. A subcontractor's right to a lien is not affected by the failure of the contractor to complete the building, where the labor or materials for which the lien is claimed have actually gone into the building. *Red River Lum. Co.* v. *Friel*, 7 N. Dak. 46 (73 N. W. Rep. 208). A provision in a building contract for the erection of a state building, providing that the balance of the contract price shall be paid "as soon as the board of control are satisfied that the said work has been completed and are assured against the existence of any mechanics' liens on said buildings," is not for the benefit of materialmen or mechanics, but solely to protect the state, and materialmen or mechanics have no interest in, or control over, any balance found to be due. *Campbell & Cameron Co.* v. *Carnegie's Estate*, 98 Wis. 99 (73 N. W. Rep. 572). In order that a subcontractor may acquire a mechanic's lien, it is not necessary that his contract and his performance of the same should conform in all respects to the contract between the contractor and the owner; and where materials furnished by a subcontractor and used in a building were inferior in quality to those called for by either contract, it is held that the landowner had no defense against the lien except such as could have been interposed by the contractor against a claim for personal judgment against him. *Wisconsin Red Pressed Brick Co.* v. *Hood*, 67 Minn. 329 (69 N. W. Rep. 1091; 64 Am. St. Rep. 418). Applying Cal. Code Civ. Proc., § 1184, it is held that where the contract price is less than $1,000, the parties may contract for the payment of the whole amount at any time, and where the contract provided for the payment of the whole amount when the building was completed, and the contractor abandoned his contract before the completion of the building which was completed by the owner, it is held that the amount available for the liens of subcontractors and materialmen is the excess remaining in the owner's hands of the contract price after the payment of the cost of completion. *Denison* v. *Burrell*, 119 Cal. 180 (51 Pac. Rep. 1). Mich. Laws, 1891, No. 179; 1893, No. 199, § 5, applied—effect of payment by owner to contractor. *Munroe* v. *Merrill*, 118 Mich. 491 (71 N. W. Rep. 850).

An agreement by the contractor with the owner that " no lien shall be filed against the building by either the contractor or subcontractors," is binding on both the contractor and subcontractors. *Morris* v. *Ross*, 184 Pa. St. 241 (38 Atl. Rep. 1084). Following, *Schroeder* v. *Galland*, 184 Pa. St. 277 (19 Atl. Rep. 682; 19 Am. St. Rep. 691; 7 L. R. A. 711). In Massachusetts it is held that a subcontractor's right to a lien is not affected by his principal contract with the owner or the status of his account with him. *Daley* v. *Legate*, 169 Mass. 257 (47 N. E. Rep. 1013); *Perry* v. *Potashinski*, 169 Mass. 351 (47 N. E. Rep. 1022). A provision in a building contract that the contractor " agrees to pay for all labor and material and allow no liens to be filed on said building, and the said proprietor reserves the right to pay for and discharge any liens that may be filed out of sums due said contractor," is held not to bar subcontractors, laborers, and materialmen of the right to claim liens upon the building. *Miles* v. *Coutts*, 20 Mont. 47 (49 Pac. Rep. 398). In reaching this conclusion the court expresses grave doubts as to the power of the contractor and the owner of a building, by contact between themselves alone, to deprive all other persons who labor or furnish materials in the construction of a building of their right to claim and enforce a lien thereon, without their assent, and upon this point the court say: " While it must be conceded that a majority of the decisions hold that a clearly expressed covenant in a contract between the contractor and the owner, that no liens shall be allowed against the building, will bind the contractor and all other persons performing labor or furnishing materials in the construction of a building, still that doctrine cannot be claimed to be the settled rule of law on the subject. In *Whittier* v. *Wilber*, 48 Cal. 175 (a suit by material men), where the contractor had contracted with the owner, among other things, to save the premises from any liens, and which contract was pleaded by the owner, the court said: ' And in such cases the contractor and owner cannot deprive the material man of his lien by introducing a stipulation into the building contract, by which the contractor agrees to indemnify the owner against any lien by persons furnishing materials to be used in the construction of the building.' *Norton* v. *Clark*, 85 Me. 357

(27 Atl. Rep. 252), is a strong case on this point. * * * We are not prepared to hold, notwithstanding the majority of decisions be that way, that rights conferred upon a person by statute may be contracted away by a contract made by others, to which he has never assented, and of which he has no knowledge. We think such a construction of our statute in relation to mechanics' liens is unauthorized, and would result in defeating the end had in view by its enactment, by practically depriving the persons sought to be benefited of all protection under its provisions."

Sec. 541. Subcontractors and material men—Contractor's agreement to take his pay in property.—Effect upon their right to liens. To entitle a subcontractor to a lien upon the owner's real estate, under Neb. Comp. Stat., ch. 54, art. 1, § 2, the owner must be indebted in money to the contractor and the contractor must be indebted in money to the subcontractor; and where the contractor has waived his right to a lien by an agreement to take a conveyance of real estate as his pay for making an improvement upon other real estate, the subcontractor is not entitled to a lien. *Frost* v. *Falgetter*, 52 Neb. 692 (78 N. W. Rep. 12). The court say: "The reason for this rule and this construction is that there is no privity of contract between a subcontractor and the owner; and the right of a subcontractor to a lien against the premises of the owner, though conferred by statute, is in subordination to the contract existing between the owner and contractor. All the authorities are agreed that a subcontractor is bound to take notice of the terms of the contract existing between the owner and the contractor; and, if that contract is of such a nature as to preclude the contractor himself from asserting a lien, the subcontractor's right to a lien fails. See the subject discussed generally in *Bowen* v. *Aubrey*, 22 Cal. 566; *Shaver* v. *Murdock*, 36 Cal. 293; *Henley* v. *Wadsworth*, 38 Cal. 356; *Dingley* v. *Greene*, 54 Cal. 338. In *Lumber Co.* v. *Murphy*, 64 Ia. 165 (19 N. W. Rep. 898), the supreme court of that state, in discussing the question under consideration, said: 'Now, while it may be that a mere stipulation on the part of the contractor not to claim a mechanic's lien would not preclude subcontractors from doing

so, we think that they are precluded where the contractor stipulates in the outset for a mode of payment inconsistent with a mechanic's lien. The contractor might stipulate for payment in labor, or some specific property other than money. If he should do so, such contract would be inconsistent with a mechanic's lien on the part of the subcontractor. * * * Subcontractors must take notice of the modes under which the contractor has a right to require the owner to discharge his liability under his contract, and must extend or withhold credit according as they see fit in view of the contract.'"

Sec. 542. Subcontractors and material men—Constitutionality of statute. A statute (Ala. Laws 1859–60, p. 514), which gives a lien to a subcontractor or material man, merely upon the presentation of his claim to the owner of the premises within thirty days after the completion of the building, without regard to the terms of the original contract for the construction of the building, or to the amount due under the contract to the contractor and whether notice of his claim has been given by the claimant or not, is unconstitutional. *Selma Sash, Door & Blind Factory* v. *Stoddard*, 116 Ala. 251 (22 So. Rep. 555). Citing, *Young* v. *Hardware Co.*, 55 O. St. 423 (45 N. E. Rep. 813); *John Spry Lumber Co.* v. *Sault Sav. Bank, Loan & Trust Co.*, 77 Mich. 199 (43 N. W. Rep. 778; 18 Am. St. Rep. 396; 6 L. R. A. 204); *Taylor* v. *Murphy*, 148 Pa. St. 337 (23 Atl. Rep. 1134; 33 Am. St. Rep. 825). In the principal case the court say: "A subcontractor or material man must take notice of the terms and character of the contract between the owner and the original contractor, and the legislature has no power to authorize a contractor to change the terms of his contract with the owner, and impose additional liabilities upon him, and liens upon his land, by any agreement with other parties to which the owner was not a party, of which he has no notice, and there is no provision by which he can acquire such notice or information."

Sec. 543. Subcontractors and material men—Statutes construed. Construing and applying Sand. & H. Ark. Dig., § 4781, which gives a lien to any one furnishing "any materials, machinery or fixtures for any building, erec-

tion or other improvement upon land," it is held that the statute does not give a lien for wrenches or belting suitable to be used in connection with machinery attached to the land, where such materials were not in any way attached to the real estate, nor a necessary part of the machinery thus attached; but a lien may be claimed for a "dry-kiln, wheels and boxes furnished," which were designed, made and fitted to a tramway in a particular kiln. *Meek* v. *Parker*, 63 Ark. 367 (38 S. W. Rep. 900; 58 Am. St. Rep. 119). In Illinois, prior to the act of 1895 (Laws 1895, p. 225), a lien for materials could only be enforced against the property to the extent they were actually used in the construction of the building, although a larger quantity was contracted for and delivered. *Compound Lum. Co.* v. *Murphy*, 169 Ill. 343 (48 N. E. Rep. 472). Prior to Ill. Laws 1895, p. 228, second subcontractors had no lien in that state. *Andrews & Johnson Co.* v. *Atwood*, 167 Ill. 249 (47 N. E. Rep. 387). One who furnishes machinery ordered by the owner of a mill to be used therein, is entitled to a lien under Ind. Rev. Stat. 1894, § 7255, although the machinery was never actually used. *Totten & Hogg I. & S. Foundry Co.* v. *Muncie Nail Co.*, 148 Ind. 372 (47 N. E. Rep. 703). One who merely furnishes machinery to a landowner having a manufacturing plant constructed on his premises, which machinery is received and placed in position by the landowner, is not a contractor within the meaning of Ind. Rev. Stat. 1894, § 7255, so as to give a subcontractor's lien to a third party who manufactured such machinery for him. The statute does not give a lien for material to one who furnishes material to another who sells it to the owner. *Caulfield* v. *Polk*, 17 Ind. App. 429 (46 N. E. Rep. 932). How. Ann. Mich. Stat., Vol. 2, §§ 8411b, 8411c, and Vol 3, § 8411a, applied—rights of subcontractors and materialmen on a contractor's bond given for their protection. *People* v. *Collins*, 112 Mich. 605 (71 N. W. Rep. 153). Mich. Laws 1891, Act. 179, § 1, construed and applied—notice by subcontractor to owner. *Smalley* v. *Ashland Brown-Stone Co.*, 114 Mich. 104 (72 N. W. Rep. 29). Mich. Pub. Acts 1893, No. 199, § 6, construed and applied—service of notice by subcontractor upon the owner or his agent. *Wiltsey* v. *Harvey*, 114 Mich. 131 (72 N. W. Rep. 134). A statute requiring service of notice

upon the owner of the premises, does not require service of notice upon a mortgagee, although his rights are given him by a deed absolute on its face. *Kay* v. *Towsley*, 113 Mich. 281 (71 N. W. Rep. 490).

Applying the statutes of Michigan, regulating the creation of liens by subcontractors and material-men, it is held that where the necessary lien statement has been filed and notice to the owner has been given, within the time prescribed by the statute, the lien is not defeated by the claimant's failure to file proof of service of such notice until after commencement of his proceedings to enforce the lien. *Smalley* v. *Northwestern Terra-Cotta Co.*, 113 Mich. 141 (71 N. W. Rep. 466). Construing and applying Minn. Gen. Stat. 1894, § 6229, giving a lien to whoever furnishes material for the construction of a building by virtue of a contract with the owner or his agent, contractor or subcontractor, it is held that the legislature did not intend to give a lien to a dealer who sells on the personal credit of a purchaser a common article of merchandise generally kept in the market, to one who is neither the owner of the building nor contractor or subcontractor under the owner for its construction, merely because the article is bought by the purchaser for the purpose of selling it again to the owner of the building and is afterwards, in fact, bought by the owner and used by him in the structure. *Ryan Drug Co.* v. *Rowe*, 66 Minn. 480 (69 N. W. Rep. 468). N. H. Pub. Stat., ch. 141, §§ 10, 13, 15, construed and applied — duty to furnish to owner statement of materials furnished every thirty days. *Lawson* v. *Kimball*, N. H. (38 Atl. Rep. 380). N. H. Pub. Stat., ch. 141, § 11, giving a lien to any person who performs "labor and furnished materials * * * for making brick, by virtue of a contract with the owner thereof," does not give a lien to one who furnishes board to employees of a brick manufactory under a contract with the latter. *Perreault* v. *Shaw*, N. H. (38 Atl. Rep. 724). Construing N. J. Pub. Laws 1895, p. 313, § 5, which forbids an owner making advance payments to a contractor so as to reduce the balance due him to an amount insufficient to meet the claims of subcontractors and materialmen, of which notice has been given, it is held that the statute does not prevent a contractor from assigning to his subcontractors or material

men, by giving orders on the owner any balance due him, and such owner is bound to recognize such equitable assignment, and the payment of such orders in advance of the terms of the contract, does not make him liable to subcontractors who have not been favored with such an assignment. *Binns* v. *Slingerland*, 55 N. J. Eq. 55 (36 Atl. Rep. 277). Under N. Dak. Comp. Laws, § 5470, a subcontractor has sixty days in which to file his claim for a lien, and payments made by the owner within that time to the contractor are made at the peril of the owner. *Red River Lum. Co.* v. *Friel*, 7 N. Dak. 46 (73 N. W. Rep. 203). Under S. Dak. Comp. Laws, § 5471, a lien cannot be enforced against the owner of a railroad for labor performed under a contract with a contractor or subcontractor, beyond the amount due from the owner to such contractor or subcontractor under a contract or subcontract at the time the services were performed. *Adams* v. *Grand Island & W. C. R. Co.*, 10 S. Dak. 239 (72 N. W. Rep. 577). Under Hill's Wash. Code, §§ 1675, 1676, one furnishing material to a contractor may maintain a personal action against him for the price, although he is seeking to enforce a lien against the building therefor, and the materials furnished are exempt from seizure under attachment or execution so long as they are in good faith, designed to be used in the building, unless it be upon a claim for the purchase money. *Potvin* v. *Wickersham*, 15 Wash. 646 (47 Pac. Rep. 25).

Sec. 544. Joint lien on several lots or buildings. Where several mining claims or locations are owned and operated as one mine, as against the parties so uniting them, they may be regarded and treated as a single claim and a lien may be declared on them as such. *Hamilton* v. *Delhi Min. Co.*, 118 Cal. 148 (50 Pac. Rep. 378). A lien for lumber used in several structures on the same tract under one contract may exist on the whole when they constitute one plant. *Salt Lake Lithographing Co.* v. *Ibex Mine & S. Co.*, 15 Utah 440 (49 Pac. Rep. 768; 62 Am. St. Rep. 944). But a lien cannot be enforced against two separate tracts of land for materials furnished for their improvement, where it is not shown that the materials for the separate improvements were furnished under an entire contract. *Meek* v. *Parker*, 63 Ark. 367 (38 S. W.

Rep. 900; 58 Am. St. Rep. 119). Where the carpenter work for several buildings on contiguous lots is performed under one contract for a lumping sum, all the buildings and lots may be subjected to a lien. *Moore* v. *Parish*, 168 Ill. 93 (45 N. E. Rep. 578). Construing and applying Minn. Gen. Stat. 1894, § 6235, it is held that where several houses are constructed upon contiguous lots under one contract, it is not necessary to file a separate lien upon each house or to apportion the amount of the entire lien between the several houses, but the balance due on the contract may be included in one lien statement and a lien therefor claimed on all the lots. *Johnson* v. *Satler*, 70 Minn. 146 (72 N. W. Rep. 974).

Sec. 545. Priority of mechanics' liens. One who takes a conveyance of land during the performance of work thereon for which a lien may be claimed, takes subject to the lien. *Dodge* v. *Hall*, 168 Mass. 485 (47 N. E. Rep. 110). An attaching creditor takes subject to the existing right of a mechanic to enforce a lien against the property. *Norton's Assignee* v. *Hope Milling, Min. & L. Co.*, Ky. (40 S. W. Rep. 688). Priority of a mechanic's lien for services performed under a continuing contract dates from the time of the first work performed. Mass. Pub. Stat., ch. 191, § 5 applied. *Savoy* v. *Dudley*, 168 Mass. 538 (47 N. E. Rep. 424). The fact that one is performing services under an entire contract and is to receive his pay by the month, does not prevent his lien from attaching from the date of the first work. *Nason* v. *Northwestern Mill. & P. Co.*, 17 Wash. 142 (49 Pac. Rep. 285). One entitled to a prior vendor's lien, may, by parol contract, postpone his lien to a mechanic's lien for material furnished to the vendee. *Townsend* v. *White*, 102 Ia. 477 (71 N. W. Rep. 337). A mechanic's lien for improvements made by a vendee in possession under an executory contract of purchase, is subordinate to a lien of the vendor who retains the legal title to secure deferred installments of the purchase price, except in cases where the vendor himself promotes the improvement or causes it to be made. Where the vendor retains the legal title he does not waive his right to a purchase money lien by mere silence and inaction. *West* v. *Reeves*, 53 Neb. 472 (73 N. W. Rep. 935). The rights of one taking a

lease without notice of a claim against the owner of the land for materials furnished for improvements thereon, for which no lien statement was filed, and after the period during which the statute protects such liens without the statement, are superior to a lien claimed for such materials. *Floete* v. *Brown*, 104 Ia. 154 (73 N. W. Rep. 488; 65 Am. St. Rep. 434).

One who takes a mortgage upon land pending the construction of a building thereon, takes subject to mechanics' liens which may be acquired on account of the erection of the building. *Graton & Knight Mfg. Co.* v. *Woodworth-Mason Co.*, N. H. (38 Atl. Rep. 790). One who takes a mortgage to secure a loan cannot claim priority over preexisting rights to mechanics' liens, on account of the fact that part of the money was used to pay the purchase price of the land. Kan. Civ. Code, § 630, applied. *Thomas* v. *Hoge*, 58 Kan. 166 (48 Pac. Rep. 844). A mechanic's lien for materials, the delivery of which was begun before the registration of a mortgage, has priority over it, although the work was not completed until after the mortgage was recorded. *Bristol-Goodson Elec. L. & P. Co.* v. *Bristol Gas, E. L. & P. Co.*, 99 Tenn. 371 (42 S. W. Rep. 19). A lien claimed against a leasehold estate for improvements commenced, and the contract for which was executed before the execution of a mortgage to the lessor for money with which to make such improvements, has priority over such mortgage. *J. B. Alfree Mfg. Co.* v. *Henry*, 96 Wis. 327 (71 N. W. Rep. 370). A lien for materials furnished to a trespasser, who subsequently acquired title to the land upon which they were used, is held not to attach until he obtained a deed and to be subject to a prior mortgage executed by him to secure a loan with which he purchased the land. *Birmingham Bldg. & L. Ass'n* v. *Boggs*, 116 Ala. 587 (22 So. Rep. 852). The priority of an existing mortgage over a mechanic's lien, does not extend to an allowance of attorney's fees, provided for in case of default in payment of the mortgage. *Garrett* v. *Adams*, Tenn. (39 S. W. Rep. 730).

Sec. 546. Priority of mechanics' liens—Statutes construed. A vendor's lien which is prior to a subsequent claim for a mechanic's lien for work done by one having

knowledge of the vendor's lien, does not lose its priority because the vendor does not give notice as provided for by Cal. Code Civ. Proc., § 1192, requiring a person having or claiming an interest in land on which an improvement is to be erected, to give notice that he will not be responsible for the cost of the same. *Kuschel* v. *Hunter*, Cal, (50 Pac. Rep. 397). Construing and applying Ky. Gen. Stat., ch. 70, art. 1, § 14, providing that mechanics' liens "shall not be effectual against a *bona fide* purchaser for a valuable consideration without notice, actual or constructive; but if such purchaser rceeives notice of the lien before the payment of the whole of the purchase money the lien shall operate on the purchase money unpaid," it is held that a mortgagee is a purchaser within the meaning of the statute; but the statute does not relate to one whose purchase antedated the time the material was furnished for which the lien is asserted, and a notice to such purchaser does not give a lien on the unpaid purchase money. *Kentucky Bldg. & Loan Ass'n* v. *Kister*, Ky. (41 S. W. Rep. 293). Construing Mich. Pub. Acts 1891, No. 179, § 9, subd. 3, as amended by Pub. Acts 1893, No. 199, which provides that "mechanics' liens shall be preferred to all other titles, liens or incumbrances which may attach to or upon such building, machinery, structure or improvement, or to or upon the land upon which they are situated subsequent to the commencement of said building, erection, structure or improvement," it is held that a mechanic's lien has priority over a mortgage executed upon the lands or premises after the actual commencement of the building, though no part of the labor performed or materials furnished for which the lien was claimed, was done or performed until after the execution and recording of the mortgage. *Kay* v. *Towsley*, 113 Mich. 281 (71 N. W. Rep. 490). Citing, *Heater Co.* v. *Gordon*, 2 N. Dak. 246 (50 N. W. Rep. 708; 33 Am. St. Rep. 776); *Murray* v. *Swanson*, 18 Mont. 533 (46 Pac. Rep. 441); Phil. Mech. Liens (3d Ed.), § 216; *Davis* v. *Billsland*, 18 Wall 659; 2 Jones, Liens (2d Ed.), § 1470; *Du Bois* v. *Wilson*, 21 Mo. 213; *Insurance Co.* v. *Pringle*, 2 Serg. & R. 138; *Lampson* v. *Bowen*, 41 Wis. 484; *Vilas* v. *Manufacturing Co.*, 91 Wis. 607 (65 N. W. Rep. 488; 51 Am. St. Rep. 925; 30 L. R. A. 778); *Supply Co.* v.

Cook, 52 Minn. 534 (54 N. W. Rep. 751). Under Mont. Comp. Stat. 1887, div. 5, § 1874, a mechanic's lien has priority over all mortgages or other liens acquired subsequent to the commencement of the work. *Johnson* v. *Puritan Min. & Mill Co.*, 19 Mont. 80 (47 Pac. Rep. 837). Utah Laws 1892, ch. 80, declaring that debts of corporations or natural persons due for services performed by laborers within six months before the seizure of the debtor's property on process, or the suspension of his business by the action of creditors, or before his property shall be put into the hands of a receiver or trustee, shall be treated as preferred, does not affect the rights of existing grantees, mortgagees, or lienholders. *Salt Lake Litographing Co.* v. *Ibex Mining & Smelting Co.*, 15 Utah 445 (49 Pac. Rep. 882). Under Wash. Ses. Laws 1893, pp. 88, 84, §§ 4, 5, a mechanic's lien duly filed within the time designated by the act, relates back to the time when the work was performed or the material furnished and takes precedence to all claims to the property improved which have been fastened upon it since that time. *Nason* v. *Northwestern Mill & P. Co.*, 17 Wash. 142 (49 Pac. Rep. 235). Applying S. & B. Ann. Wis. Stat., § 3314, providing that a mechanic's lien "shall be prior to any other lien which originates subsequent to the commencement of the construction" of a building, it is held that where a mechanic's lien attaches to property by the commencement of work upon the premises after the execution of a mortgage but before the recording of it, the mortgage is superior by virtue of the prior execution. *Mathwig* v. *Mann*, 96 Wis. 213 (71 N. W. Rep. 105; 65 Am. St. Rep. 47).

Sec. 547. Priority of mechanics' liens—Construction of statutes giving priority on buildings—Removal. Under Mont. Comp. Stat., div. 5, § 1876, a mechanic's lien has priority over a prior mortgage on the land as to the improvement for which it is claimed, where such improvement is capable of severance, but if the improvement is incapable of severance the lien attaches to the land itself and is subsequent to a preexisting mortgage. *Johnson* v. *Puritan Min. & Milling Co.*, 19 Mont. 80 (47 Pac. Rep. 837). Construing McClain's Ia. Code, § 3317, subd. 4, giving

mechanics' liens for buildings erected on mortgaged land priority as to the buildings, it is held that the statute gives the holder of a mechanic's lien against an independent building, a priority of right in every case where the court shall find as a fact that such building can be removed without material injury to the security of the earlier lien holder, but where no such finding is made the land must be sold and the purchase price applied first in payment of the prior incumbrance. *Tower* v. *Moore*, 104 Ia. 845 (78 N. W. Rep. 828).

Sec. 548. Loss or waiver of lien. The burden of proving a waiver of the lien is upon the owner of the property or whoever may be seeking to avoid it. *Maryland Brick Co.* v. *Dunkerly*, 85 Md. 199 (36 Atl. Rep. 761). A surety on the bond of a contractor to keep the building free from liens, is not thereby prevented from claiming a lien for materials furnished. *Atlanta Coast Brewing Co.* v. *Clement*, 59 N. J. L. 488 (36 Atl. Rep. 883). The appointment of a receiver for a company against whom a lien is claimed, does not operate to destroy the right to enforce the lien. *Totten & Hogg I. & S. Foundry Co.* v. *Muncie Nail Co.*, 148 Ind. 372 (47 N. E. Rep. 708). A material man does not waive his lien by the levy of an attachment, afterwards dismissed, on the same property to secure the same demand. *Salt Lake Lithographing Co.* v. *Ibex Mine & S. Co.*, 15 Utah 440 (49 Pac. Rep. 768; 62 Am. St. Rep. 944). A contractor who agrees to take a conveyance of a certain piece of real estate in payment of his compensation for making an improvement on other land, thereby waives his right to a lien upon the premises upon which the improvement is erected. *Frost* v. *Falgetter*, 52 Neb. 692 (78 N. W. Rep. 12). One accepting property in payment of his claim for which he was entitled to a mechanic's lien, although the title to the property fails and it is replevied by the legal owner, loses the right to a lien, as against a *bona fide* mortgagee subsequently making advances. *Garrett* v. *Adams*, Tenn. (39 S. W. Rep. 780). A mechanic's lien is a privilege conferred by statute which may be waived by the express agreement of the party in whose favor it exists; and where a party stipulates with a vendee of premises that he will look to some other person for the payment of his claims

for services performed thereon, or that all such claims have been paid, he thereby waives his lien on such premises. *Dwyer* v. *Salt Lake City Copper Mfg. Co.*, 14 Utah 339 (47 Pac. Rep. 811). For opinion denying rehearing in case of *Barnett* v. *Stevens*, 16 Ind. App. 420 (43 N. E. Rep. 661, epitomized in Vol. V, Ballards' Law Real. Prop., § 523), see *Barnett* v. *Stevens*, 16 Ind. App. 420 (45 N. E. Rep. 485). Particular case in which a subcontractor was held to have abandoned his right to a lien. *Wood* v. *Haney*, Tenn (41 S. W. Rep. 1072).

Sec. 549. Loss or waiver of lien—Taking notes or collateral security. A lien claimant does not waive his right to enforce a lien by taking a note which matures before the expiration of the time given to enforce the lien. *Hines* v. *Chicago Bldg. & Mfg. Co.*, 115 Ala. 687 (22 So. Rep. 160). In order for the taking of a note to operate as a waiver of the lien it must be shown to have been taken in absolute payment of the account for which the lien is claimed. *Meek* v. *Parker*, 68 Ark. 367 (38 S. W. Rep. 900; 58 Am. St. Rep. 119). The mere acceptance of a note by one who has filed a claim for a mechanic's lien, for the amount of such claim, does not operate as a waiver of his lien unless such was the intention of the parties. *Hersh & Son* v. *Carman*, 51 Neb. 784 (71 N. W. Rep. 718). The same rule applies to one taking a note secured by a mortgage on the property against which the lien is sought. *Farmers & Mechanics' Nat. Bank* v. *Taylor*, Tex. Civ. App. (40 S. W. Rep. 876). The taking of collateral security by a lien claimant does not operate as a waiver of his lien, where such was not the intention of the parties; the taking of such security for part of his claim does not raise the presumption of waiver of the lien as to the balance. *Bristol-Goodson Elec. L. & P. Co.* v. *Bristol Gas, E. L. & P. Co.*, 99 Tenn. 371 (42 S. W. Rep. 19). Where one having an inchoate right to a lien against the property of a gas company, for the erection of a gas plant, induced it to issue bonds secured by first mortgage lien on its property, some of which he took as collateral security for his claim and assisted in disposing of such bonds to innocent purchasers, as against such, he will be estopped to assert his lien. *Bristol-Goodson Elec. L. & P.*

Co. v. *Bristol Gas, E. L. & P. Co.*, 99 Tenn. 871 (42 S. W. Rep. 19). Notes of a third person are "collateral security" within the meaning of S. Dak Comp. Laws, § 5468, which provides that no person is entitled to a mechanic's lien who takes collateral security in the same contract. *Edward P. Allis Co.* v. *Madison Elec. L. H. & P. Co.*, 9 S. Dak. 459 (70 N, W. Rep. 650). A statute (Ky. Stat. 1894, § 2467), providing that a mechanic's lien shall have no effect "if security shall have been taken for labor performed or materials furnished," does not apply where the lien claimant is induced by fraud to accept a worthless security. *Norton's Assignee* v. *Hope Milling, Min. & L. Co.*, Ky. (40 S. W. Rep. 688).

Sec. 550. Filing and recording building contract—Statute construed. Construing Cal Code Civ. Proc., § 1188, which renders certain building contracts void if the plans and specifiations are not filed and recorded and declares that "in such case the labor done and materials furnished by all persons aforesaid, except the contractor, shall be deemed to have been done and furnished at the personal instance of the owner and they shall have a lien for the value thereof," it is held that the owner is not personally liable for the labor done and materials furnished at the instance of the contractor, even though the contract be void, the only remedy against the owner in such case being a foreclosure of the lien; but the contractor is personally liable for such labor and materials and he may be made a party defendant in actions to foreclose the liens and a personal judgment may be rendered against him. Sureties upon the bond of a contractor are liable on the bond though the contract is void under the statute. *McMenomy* v. *White*, 115 Cal. 339 (47 Pac. Rep. 109). As to the liability of the sureties upon the bond of the contractor this case is followed in the case of *Summerton* v. *Hanson*, 117 Cal. 252 (49 Pac. Rep. 185). It is also followed as to the personal liability of the owner in the case of *Gnekow* v. *Confer*, Cal. (48 Pac. Rep. 881). Construing this statute in connection with § 1186, it is held that where the original contractor abandons the building which is finished by the owner, persons furnishing labor and materials must file their claim within thirty days from its completion. *Pierce* v. *Birkholm*, 115 Cal. 657

(47 Pac. Rep. 681). The statute is not complied with by recording a contract which refers to plans and specifications in the hands of an architect. *Pierce* v. *Birkholm*, 115 Cal. 657 (47 Pac. Rep. 681).

Sec. 551. Filing of lien statement. A lien statement need not state matters which the statute does not require it to contain. *Jeffersonville Water Supply Co.* v. *Ritter*, 146 Ind. 521 (45 N. E. Rep. 697). All the parts of a lien statement should be construed together, and, when thus construed, if they meet the substantial requirements of the statute, the statement is sufficient. *Drexel* v. *Richards*, 50 Neb. 509 (70 N. W. Rep. 28). A lien statement is insufficient where it does not state either directly or by necessary inference, the name of the person to whom the claimants furnished material or for whom they performed the labor for which they seek to enforce the lien, or that claimants, have, in fact, performed labor upon or furnished material for the building mentioned. *Getty* v. *Ames*, 30 Or. 578 (48 Pac. Rep. 855; 60 Am. St. Rep. 885.) Where the lien statement complies with a statute (N. Dak. Comp. Laws, § 5470), requiring the lien claimant to file "a just and true account of the demand due him after allowing all the credits and containing a correct description of the property to be charged with said lien and verified by his affidavit," it need not set forth all the facts necessary to entitle the party to a lien. *Red River Lumber Co.* v. *Friel*, 7 N. Dak. 46 (73 N. W. Rep. 208). It may be signed for the claimant by his attorneys. *Jeffersonville Water Supply Co.* v. *Ritter*, 146 Ind. 521 (45 N. E. Rep. 697). In Pennsylvania, a lien for original construction, and a lien for addition, alteration or repair are given by distinct statutes, and a lien claim must show on its face to which class it belongs and contain sufficient allegations to bring it within the provisions of the statute. *Wharton* v. *Real Estate Inv. Co.*, 180 Pa. St. 168 (36 Atl. Rep. 725; 57 Am. St. Rep. 629). Mich. Pub. Acts 1891, No. 179, § 4, construed and applied—duty of contractor to furnish owner sworn statement of subcontractors and laborers, showing amount due them as a prerequisite to file a lien claim. *Wiltsie* v. *Harvey*, 114 Mich. 181 (72 N. W. Rep. 184).

Sec. 552. Filing of lien statement by subcontractor or material man. A subcontractor's lien statement which makes a lumping charge and shows several items which can be itemized is bad. *Wharton* v. *Real Estate Inv. Co.*, 180 Pa. St. 168 (86 Atl. Rep. 725; 57 Am. St. Rep. 629). Where bricks for several buildings are furnished under one continuous account, a lien may be filed within the statutory limit from the date of the last items furnished, though several months have elapsed between such items and preceding ones. *Maryland Brick Co.* v. *Dunkerly*, 85 Md. 199 (36 Atl. Rep. 761). A statute (Mich Laws 1891, Act 179, § 5), requiring a subcontractor to file a statement showing the amount "justly and truly due him," does not prevent a subcontractor from filing a lien claim for amounts for which he has taken notes that are not due at the time of filing his lien statement. *Smalley* v. *Brown-Stone Co.*, 114 Mich. 104 (72 N. W. Rep. 29). In California, the filing of a notice of lien by a material man before completion of the building, is premature and confers no right to enforce a lien. Particular evidence examined and held sufficient to sustain a finding that a building was completed at the time the lien claim was filed. *Santa Monica Lum. & Mill Co.* v. *Hege*, 119 Cal. 376 (51 Pac. Rep. 555).

Sec. 553. Lien statement—Time for filing. A lien may be filed to secure the payment of money not yet due by the terms of of the contract. *Healy* v. *Fallon*, 69 Conn. 228 (37 Atl. Rep. 495). Where one contracts to make certain machinery and deliver it "free on board of cars" at a designated place, for a stipulated sum, it is held that the machinery is furnished when it is delivered in accordance with the contract, on board the cars at the place named without expense to the purchaser, and the time given to file a lien dates from that time. *Congdon* v. *Kendall*, 58 Neb. 282 (78 N. W. Rep. 659). Following, *King* v. *Building Co.*, 50 O. St. 320 (34 N. E. Rep. 486). Where materials are furnished under independent contracts, the time for filing the lien statement begins to run from the time the material is furnished under each contract. Wis. Rev. Stat., § 3318, applied. *Brown* v. *Edward P. Allis Co.*, 98 Wis. 120 (73 N. W. Rep. 656). Where one's contract to furnish brick specified no time within

which they were to be delivered but he was to deliver them as needed and ordered, it is held that a notice given within thirty days after the completion of the walls was sufficient, though not in thirty days after the last of the brick were furnished. *Bristol Brick Works* v. *King College*, Tenn. (41 S. W. Rep. 1069). All the materials for which there are charges in a mechanic's lien claim, must have been furnished as parts of one transaction or under one contract for a building or job of work; and in determining the time within which a lien statement must be filed, whether all the items of charges for materials were so furnished under a single contract or some items arising nnder separate and independent transactions or contracts have been included in the claim of lien, are questions of fact for the jury, or for the court, if the case is tried to the court without a jury. *Nye & Schneider Co.* v. *Berger*, 52 Neb. 758 (78 N. W. Rep. 274). Under Cal. Code Civ. Proc., § 1187, every person except the original contractor must file his claim of lien within thirty days after the completion of any building, improvements or structure. *Pierce* v. *Birkholm*, 115 Cal. 657 (47 Pac. Rep. 681). Particular evidence held sufficient to show that a lien claim was filed within thirty days after the completion of the building. *Ward* v. *Crane*, 118 Cal. 676 (50 Pac. Rep. 839). Under Utah Sess. Laws 1890, ch. 80, §§ 10, 11, a lien statement may be filed within forty days after the materials are furnished or labor performed. *Culmer* v. *Clift*, 14 Utah 286 (47 Pac. Rep. 85). A failure to file a mechanic's lien statement within ninety days as provided by McClain's Ia. Code, § 3314, does not defeat its priority except as against purchasers or incumbrancers in good faith without notice whose rights accrued after the ninety days and before any claim for a lien was filed. *Lee* v. *Hoyt*, 101 Ia. 101 (70 N. W. Rep. 95). R. I. Gen Laws, ch. 206, §§ 5, 7, 9, construed and applied—time within which lien statement may be filed. *Goff* v. *Hosmer*, 20 R. I. 91 (37 Atl. Rep. 533).

Sec. 554. Lien statement—Extending time for filing by repairs or substitution of new materials. After a building has been accepted as completed, according to the terms of the contract for its construction, the renewal or repair of some

of its parts upon a discovery of their defects, will not extend the time for filing a lien otherwise excluded by the lapse of time. *Brown & Haywood Co.* v. *Trane*, 98 Wis. 1 (73 N. W. Rep. 561); *Congdon* v. *Kendall*, 53 Neb. 282 (73 N. W. Rep. 659); *Avery* v. *Butler*, 30 Or. 287 (47 Pac. Rep. 706). In the last case the court say: "While there is seemingly a conflict of authority upon this question, we think the better reason supports the rule that, after a structure has been completed, inspected, and approved by the owner or his lawful agent, any latent defects, existing in the material or workmanship, that may be cured by the builder upon the request of the owner, are to be considered as repairs, and not omissions in the performance of the original contract. When work demanded by the terms of the original contract has been omitted, the final completion of the structure dates from the time such omissions are supplied by the builder at the request of the owner, although in the meantime the latter may have taken possession of the property (*Stock Yards* v. *O'Reilly*, 85 Ill. 546; *Holden* v. *Winslow*, 18 Pa. St. 160); the rule seeming to be that while there is anything to do which it is the duty of the builder to perform, under the terms of the contract, the work upon which he is engaged is not completed until this obligation is accomplished (*Watts-Campbell Co.* v. *Yuengling*, 51 Hun, 302 (3 N. Y. Supp. 869); so that, if the window blinds were demanded by the terms of the original contract, the house could not be considered completed until they were supplied. So, too, when the builder, after a substantial completion of the structure, at the request of the owner, makes additions to it which are useful or necessary to its enjoyment, the final completion dates from the time such additions are made. *Hofer's Appeal*, 116 Pa. St. 360 (9 Atl. Rep. 441); *Nichols* v. *Culver*, 51 Conn. 177. When the work has been apparently completed, but not accepted, the restoration by the builder of a part to which objection has been made is considered as a substitution under the terms of the original agreement, and not a repair, and therefore the statute begins to run only from the final completion of the imperfectly performed obligation. *Bruce* v. *Berg*, 8 Mo. App. 204; *Scott* v. *Cook*, Id. 198; *Worthen* v. *Cleaveland*, 129 Mass. 570; *Harrison* v. *Association*, 134 Pa. St. 558 (19 Atl. Rep.

804; 19 Am. St. Rep. 714); *Jefferson Water-Supply Co.* v. *Riter*, 138 Ind. 170 (37 N. E. Rep. 652). But, after a building has been accepted, repairs made thereon, will not revive a lien for labor performed upon or materials furnished to be used in the structure prior to such acceptance. *Berry* v. *Turner*, 45 Wis. 105; *Dunn* v. *McKee*, 5 Sneed, 657. In *Conlee* v. *Clark*, 14 Ind. App. 205 (42 N. E. Rep. 762; 56 Am. St. Rep. 298), the appellate court of Indiana reached a different conclusion, which is much weakened, however, by the fact that two of the judges dissented from the opinion announced by the majority. The latter rule also prevails in California. *McIntire* v. *Trautner*, 63 Col. 429."

Sec. 555. Lien statement—Allegations as to ownership of property. Where the statement should contain the name of the owner, if known to the claimant, a failure to give his Christian name, where the statement alleges that it was unknown to the claimant, does not render it insufficient. Mont. Comp. Laws 1887, §§ 1871, 1872, 1878, construed and applied. *Richards* v. *Lewisohn*, 19 Mont. 128 (47 Pac. Rep. 645). Under S. Dak. Comp. Laws, § 5476, a mechanic's lien is valid although the notice of lien does not state the name of the owner of the land against which the lien is filed. *Red River Lum. Co.* v. *Friel*, 7 N. Dak. 46 (73 N. W. Rep. 208).

Sec. 556. Lien statement—Description of premises. The validity of a lien statement is not affected by the fact that it does not cover as much of the property of the owner as it might cover. *Culmer* v. *Clift*, 14 Utah 286 (47 Pac. Rep. 85). Where the whole of a building for which a claimant has furnished labor and material does not stand upon the real estate described in his statement, his claim for a lien is limited to the labor and materials furnished to that portion of the building which stands upon the described premises. *Western Cornice Mfg. Works* v. *Leavenworth*, 52 Neb. 418 (72 N. W. Rep. 592). As between the landowner and the lien claimant, any description which will enable a party familiar with the locality to identify the property with reasonable certainty, is sufficient. *Dodge* v. *Hall*, 168 Mass. 435 (47 N. E. Rep. 110); *Howe* v. *Smith*, 6 N. Dak. 432 (71 N. W. Rep. 552). See

opinion for particular description held sufficient. The last case is followed in *Red River Lum. Co.* v. *Friel*, 7 N. Dak. 46 (73 N. W. Rep. 203). A lien statement should describe the premises upon which a lien is sought and such description is sufficient if it renders the location of the property susceptible of ready ascertainment by the aid of extrinsic evidence. It is held that a description of property as the "Bartlett & Downing block, Kearney, Buffalo county, Nebraska," is a sufficient description when there are no rights of other parties to be affected by the lien. *Drexel* v. *Richards*, 50 Neb. 509 (70 N. W. Rep. 23). A former opinion in the same case holds such a description insufficient as against third persons, see *Drexel* v. *Richards*, 48 Neb. 782 (67 N. W. Rep. 742). Construing S. Dak. Comp. Laws, § 5470, requiring a lien claimant to file a statement "containing the correct description of the property to be charged with said lien," and § 5485, giving a lien against a railroad to a person aiding in its construction, it is held that the "property to be charged" with a lien claimed by a subcontractor for labor performed on one section of a railroad is the entire road and not merely one section, and a description which does not embrace the entire road is insufficient. *Adams* v. *Grand Island & W. C. R. Co.*, 10 S. Dak. 289 (72 N. W. Rep. 577).

Sec. 557. Lien statement—Statement of contract and account. Applying Cal. Code Civ. Proc., § 1187, which requires the lien claim of a material man to contain "a statement of his demand after deducting all just credits and off sets," it is held that the law requires a true statement and that a materially false statement as to the value of materials furnished renders the notice fatally defective and the right to a lien is lost. *Santa Monica Lum. & Mill Co.* v. *Hege*, 119 Cal. 376 (51 Pac. Rep. 555). Construing and applying Mo. Rev. Stat. 1889, § 6709, requiring the lien statement to contain "a just and true account" of the demand claimed as a lien, a statement giving the items and prices charged, which discloses that they were furnished between certain specified dates, the last of which is within the time given for filing a lien, is sufficient without giving the date each item was furnished. *Mitchell Planing-Mill Co.* v. *Allison*, 138 Mo.

50 (40 S. W. Rep. 118; 60 Am. St. Rep. 544). Applying Ill. Rev. Stat. 1891, ch. 82, § 4, requiring a contractor's lien statement to set forth "a just and true statement or account or demand due him, after allowing all credits, setting forth the times when such material was furnished or labor performed," it is held that a lien statement by one who had contracted to furnish the materials and perform the carpenter work on several buildings as a whole, for a lumping sum, need not specify the separate items of work or material, or the particular dates upon which each was furnished, or the price, and the dates are sufficiently given by stating the period during which the contract was executed. Nor is a different construction of the statute required by the fact that in such a case the contractor was prevented from fully performing his contract on account of the owner's fault, and was only entitled to recover a proportionate part of the contract price. *Moore* v. *Parish*, 168 Ill. 98 (45 N. E. Rep. 578). In support of the first proposition the court cites, Phil. Mech. Liens, § 852; 2 Jones, Liens, § 418; *Lumber Co.* v. *Newton*, 72 Ia. 90 (33 N. W. Rep. 377); *Davis* v. *Hines*, 6 O. St. 473; *Thomas* v. *Huesman*, 10 O. St. 152; *Baptist Church* v. *Trout*, 28 Pa. St. 158; *Lee* v. *Burke*, 66 Pa. St. 336; *Hilliker* v. *Francisco*, 65 Mo. 598; *Wilson* v. *Merryman*, 48 Md. 328; *Wescott* v. *Bunker*, 83 Me. 499 (22 Atl. Rep. 388); *Doolittle* v. *Plenz*, 16 Neb. 158 (20 N. W. Rep. 116). Applying Ill. Rev. Stat. ch. 82, § 4, it is held that where a contract is entire for all the brick and stone work of a building, the statement need not specify the time during which each particular kind of mason work was done, but where a distinct price was fixed for each kind of mason work, the statement must show the amount of each particular kind of mason work done. *Ehdin* v. *Murphy*, 170 Ill. 399 (48 N. E. Rep. 956). Particular statement of account and contract held sufficient under Ill. Rev. Stat., 1889, ch. 82, § 4. *Grace* v. *Oakland Bldg. Ass'n*, 166 Ill. 637 (46 N. E. Rep. 1102). Where a lien claimant's contract was to furnish a certain group of articles for a certain price, a statement reciting those articles and then stating that price as the charge therefor, is sufficient. *Mitchell Planing-Mill Co.* v. *Allison*, 138 Mo. 50 (40 S. W. Rep. 118; 60 Am. St. Rep. 544).

Sec. 558. Lien statement — Mistakes — Amendments. The mistake of a lien claimant in including in his account items for which no lien can be claimed, does not affect his lien as to proper items where they can be separated from the improper ones, *Stokes* v. *Green*, 10 S. Dak. 286 (73 N. W. Rep. 100); but where lienable and nonlienable items are so confused in a statement that they cannot be separated it is void *in toto*. *Boyle* v. *Mountain Key Min. Co.*, N. M. (50 Pac. Rep. 847). See Ballards' Law Real Prop., Vol. V, § 538. Under the statute of New Jersey, a lien claim may be amended in any particular which does not enlarge the claim either in the amount of the debt, in the estate to be charged or in the persons to be affected, even though the time for filing a new claim has expired, provided judgment has not been entered on the claim. If the bill of particulars annexed to a lien claim is so defective that it would not warrant a judgment to enforce the lien, but does not contain any willful or fraudulent misstatements of the matters directed by the act to be inserted therein, it may be amended and made perfect under the statute. *American Brick & Tile Co.* v. *Drinkhouse*, 59 N. J. L. 462 (36 Atl. Rep. 1034).

Sec. 559. Lien statement—Verification. The verification may be made by an agent of the claimant. *Red River Lum. Co.* v. *Friel*, 7 N. Dak. 46 (73 N. W. Rep. 208). Under Utah Laws 1890, p. 26, § 10, the verification may be made by the claimant's attorney. *Culmer* v. *Clift*, 14 Utah 286 (47 Pac. Rep. 85). A claimant's affidavit that the statement is true to the best of his knowledge and belief is held sufficient in Illinois, *Grace* v. *Oakland Bldg. Ass'n*, 166 Ill. 637 (46 N. E. Rep. 1102); but where the verification specifies certain particulars in which the lien statement is true and does not contain a general allegation of the truth of the whole statement, it is insufficient if such specifications do not include all the essential elements of the lien statement. Starr & C. Ann. Ill. Stat., Vol. 3, pp. 819, 822, §§ 4, 28, construed and applied. *Orr & Lockett H. Co.* v. *Russell*, 169 Ill. 100 (48 N. E. Rep. 444; 61 Am. St. Rep. 151). Following, *McDonald* v. *Rosengarten*, 134 Ill. 126 (25 N. E. Rep. 429).

Sec. 560. Enforcement of lien—Complaint. Where the complaint shows the furnishing of such materials and labor as entitle the plaintiff to a lien, it is not necessary for it to allege specifically what was constructed. *Parker Land & Imp. Co.* v. *Reddick*, 18 Ind. App. 616 (47 N. E. Rep. 848). A complaint to foreclose a mechanic's lien on several mining claims, is insufficient where it includes several distinct claims, tracts and lots of land, all of which are noncontiguous, where it does not designate the particular property on which the material for which the lien is claimed was used. *Big Blackfoot Mill. Co.* v. *Blue Bird Min. Co.*, 19 Mont. 454 (48 Pac. Rep. 778). A complaint to enforce a lien for materials furnished, which does not allege that they were furnished under a continuing contract, is sufficient to enforce a lien for items furnished within the period allowed for filing a lien statement. *Indiana Mut. Bldg. & L. Ass'n* v. *Paxton*, 18 Ind. App. 804 (47 N. E. Rep. 1082). Where it appears that claims designed to be covered by two separate counts in the same declaration are identical, there is no merger of a lien claim with the nonlien claim. Me. Rev. Stat., ch. 91, § 42, applied, *Laughlin* v. *Reed*, 89 Me. 226 (36 Atl. Rep. 131). A complaint must affirmatively show that the notice filed by the lien claimant contained all the essential provisions required by the statute (Hill's Ann. Or. Laws, § 3673). It is held sufficient to aver that the claimant filed a notice "in pursuance of the statute in such cases made and provided." *Smith* v. *Wilkins*, Or. (48 Pac. Rep. 708). Particular complaint held sufficient to comply with the rule requiring the complaint to affirmatively show that the notice of the lien claim was filed in the proper form. *Matthiesen* v. *Arata*, 32 Or. 342 (50 Pac. Rep. 1015). Mills' Ann. Colo. Stat., § 2894, applied—foreclosure of several liens by one person as assignee—sufficiency of allegations as to service of notice and filing of statement. *Rialto Mining & Milling Co.* v. *Lowell*, 23 Colo. 253 (47 Pac. Rep. 263).

Sec. 561. Enforcement of lien—Parties. The contractor is not a necessary party to an action to enforce a subcontractor's lien where no personal judgment is sought against such contractor. *Cooper Mfg. Co.* v. *Delahunt*, Or.

(51 Pac. Rep. 649). Where two contractors furnish labor and material towards the erection of an improvement on real estate in pursuance of separate contracts with the owner thereof, and one of said contractors files his claim for a lien under the statute, and then brings suit to have such lien established and foreclosed, the other contractor is a proper and necessary party to such suit, although at the time the action was brought he had not filed his claim for a lien; and the decree in such a case is a nullity as to the contractor not made a party, who may subsequently enforce his lien, although at the time of filing his lien claim he had knowledge of the pendency of the prior action. *Wakefield* v. *Van Dorn*, 58 Neb. 28 (78 N.W. Rep. 226). Citing, *Steigleman* v. *McBride*, 17 Ill. 300; *Kelley* v. *Chapman*, 13 Ill. 580; *Whitney* v. *Higgins*, 10 Cal. 547 (70 Am. Dec. 748); *Jones* v. *Hartsock*, 42 Ia. 147.

Sec. 562. Enforcement of lien—Defenses. Where a purchaser of property from a corporation defends against a lien sought to be enforced under a contract with it, he may show that the contract was not legally binding on the corporation. *Des Moines Mfg. & Supply Co.* v. *Tillford Milling Co.*, 9 S. Dak. 542 (70 N. W. Rep. 889). Where the contract requires the work to be in perfect order when finished, no lien can be enforced where the contractor has substituted work or materials so defective as to be practically useless, although no objection was made by the supervising architect. *Monahau* v. *Fitzgerald*, 164 Ill. 525 (45 N. E. Rep. 1013). The objection that the lien claimant is not entitled to enforce his lien because he does not show an architect's certificate of the performance of his work according to the contract as provided for in the contract, is waived, where the owner does not raise it by his pleadings and puts in issue, by other allegations, the question of the proper performance of the work. *Healy* v. *Fallon*, 69 Conn. 228 (37 Atl. Rep. 495). Where it appears that the plaintiff was entitled to receive a certain amount, after deducting damages caused by deviations from the contract, at a certain time, interest may be allowed him as damages for the detention of this amount, from the date it was due to the date of the judgment. *Healy* v. *Fallon*, 69 Conn. 228 (37 Atl. Rep. 495). Particular affidavit of defense

held sufficient. *Thomas* v. *O'Donnell*, 188 Pa. St. 145 (38 Atl. Rep. 597). An answer by a subcontractor in the nature of a cross bill, is not fatally defective because it fails to allege that the owner has made payments to the principal contractor in violation of the statute. Mich. Laws 1891, Act 179, §§ 1, 4, applied. *Smalley* v. *Ashland Brown-Stone Co.*, 114 Mich. 104 (72 N. W. Rep. 29). Mich. Acts 1891, No. 179, § 10, construed and applied—filing of cross complaint. *Smalley* v. *Northwestern Terra-Cotta Co.*, 113 Mich. 141 (71 N. W. Rep. 466).

Sec. 563. Enforcement of lien—Statute of limitations. The commencement of an action to foreclose a mechanic's lien against the owner of the property does not preserve the lien as against other lienholders or incumbrancers beyond the statutory period for bringing such an action. *Falconer* v. *Cochran*, 68 Minn. 405 (71 N. W. Rep. 386). The statute of limitations begins to run against the enforcement of a mechanic's lien from the time of filing the claim of lien. *Pardue* v. *Missouri Pac. R. Co.*, 52 Neb. 201 (71 N. W. Rep. 1022; 66 Am. St. Rep. 489). Applying Oklahoma statute, providing that any owner shall not be liable to an action by any contractor until the expiration of sixty days from the time of the completion of the work or the furnishing of materials, it is held that if an action is brought within the sixty days, and the owner, instead of promptly making objection by proper motion or plea, which can be determined before the merits of the action are tried, presents issues upon the merits of the case, included within his denial and counterclaim for damages, and proceeds to the trial of the case upon the merits, he cannot thereafter be heard to assert that the action was brought too soon. *El Reno Elec. Light & Telep. Co.* v. *Jennison*, 5 Okla. 759 (50 Pac. Rep. 144). Me. Rev. Stat., ch. 91, §§ 84, 85, construed and applied—time given for commencement of action to enforce lien—extension on account of insolvency proceedings against debtor. *Laughlin* v. *Reed*, 89 Me. 226 (36 Atl. Rep. 131). R. I. Gen. Laws, ch. 206, §§ 5, 7, 9, construed and applied—time within which action to enforce lien may be brought. *Goff* v. *Hosmer*, 20 R. I. 91 (37 Atl. Rep. 583); *Birtwell* v. *Hosmer*, 20 R. I. 309 (38 Atl. Rep. 946).

Sec. 564. Enforcement of lien—Amendments. After the expiration of the time allowed for the filing of a lien, a claim for a lien and the complaint to enforce it against a tenant's leasehold estate cannot be amended so as to assert a claim against the landlord's interest in fee. *J. B. Alfree Mfg. Co.* v. *Henry*, 96 Wis. 827 (71 N. W. Rep. 870). Under the statute of Oklahoma, it is held that a defective verification of a lien statement may be amended; and where the property was described in a mechanic's lien as being "lots 17 and 18 in block 103 in the Foreman addition to the city of El Reno, Canadian county, Oklahoma Territory," it is held that it was proper for the court, on the trial of the case a year afterwards, to permit an amendment showing that this was property of the same description in the city of El Reno, instead of Foreman's addition to the city of El Reno, it being found by the court that there was at that time no Foreman's addition to the city of El Reno, but that there was such property by a former plat, and that these lots in this block, by their later description, were the same property as were formerly platted by the first, and erroneous, description. *El Reno Elec. Light & Telep. Co.* v. *Jennison*, 5 Okla. 759 (50 Pac. Rep. 144). Mass. Pub. Stat., ch. 191, § 20, applied—amendment of petition. *Dodge* v. *Hall*, 168 Mass. 435 (37 N. E. Rep. 110). Mich. Acts 1891, No. 179, §§ 10, 27, construed and applied—amendments. *Smalley* v. *Northwestern Terra-Cotta Co.*, 113 Mich. 141 (71 N. W. Rep. 466).

Sec. 565. Enforcement of lien—Personal judgment. A subcontractor having no privity of contract with the owner is not entitled to a personal judgment against him. *Hume* v. *Robinson*, 23 Col. 359 (47 Pac. Rep. 271). Under Mont. Comp. Stat. 1887, div. 5, § 1383, a personal judgment cannot be rendered against the defendant served by publication only and who has not appeared. *Richardson* v. *Lewisohn*, 19 Mont. 128 (47 Pac. Rep. 645). In Oregon it is held that the supreme court has no jurisdiction on an appeal in a suit to foreclose a mechanic's lien, to enter a decree for any sum in excess of that found to be a lien upon the property described. *Allen* v. *Elwert*, 29 Or. 428 (48 Pac. Rep. 54).

Sec. 566. Enforcement of lien—Evidence. Evidence that a married woman knew of the construction of improvements on her real estate, assisted in the selection of the materials, gave directions as to the work, and evinced an expectation to pay therefor, is sufficient to sustain a decree enforcing a mechanic's lien for such improvements. *Foskett & Bishop Co.* v. *Swayne*, 70 Conn. 74 (38 Atl. Rep. 898). Utah Comp. Laws, §§ 3252, 3258; Laws 1890, p. 27, § 14, applied in a particular case in which the variance between allegations and proof was held immaterial. *Culmer* v. *Clift*, 14 Utah 286 (47 Pac. Rep. 85). For cases determining particular questions of evidence in actions to enforce mechanic's liens, see *Johnson* v. *Puritan Min. & Milling Co.*, 19 Mont. 80 (49 Pac. Rep. 387); *Justis* v. *Myers*, 68 Minn. 481 (71 N. W. Rep. 667).

Sec. 567. Enforcement of lien—Miscellaneous notes—Statutes construed. It is error to allow attorney's fees upon a judgment by default where no demand was made for them and no allegation in reference to them was contained in the bill. *Price* v. *Boden*, 39 Fla. 218 (22 So. Rep. 657). A mechanic's lien may be asserted by a cross complaint. *Smalley* v. *Ashland Brown-Stone Co.*, 114 Mich. 104 (72 N. W. Rep. 29). To sustain an action to foreclose a mechanic's lien, it must appear in evidence that the statement of the claim therefor has been filed with the proper officer of the county within the time prescribed by the statute. *Cummins* v. *Vandeventer*, 52 Neb. 478 (72 N. W. Rep. 955). Where the joint and several contract of several contractors provides that the workmanship and materials are to be "to the full and complete satisfaction" of a certain named superintendent who was, as a condition precedent to the contractors receiving payment, required to certify in writing that such contractors were respectively entitled to receive payment, a lien cannot be enforced where this condition is not shown to have been complied with. *Forster Lum. Co.* v. *Atkinson*, 94 Wis. 578 (69 N. W. Rep. 847). A subcontractor having the right to foreclose a mechanic's lien and recover personal judgment against the contractor in the same action, may have a judgment foreclosing his lien, although he is not entitled to a per-

sonal judgment on account of failure to get personal service on the contractor. *O'Rourke* v. *Butte Lodge No. 14, I. O. G. T.*, 19 Mont. 541 (48 Pac. Rep. 1106). Where demands due at separate times are included in a mechanic's lien, and parts of the lien described were due at the time the action was brought and part not due, no objection being made, the court may render judgment for the amount which was not due at the time the action was brought but subsequently fell due and was unpaid when the decree was rendered. *El Reno Elec. L. & Telep. Co.* v. *Jennison*, 5 Okla 759 (50 Pac. Rep. 144).

Where the general owner of a building made a contract for labor and materials for its construction, and in answer to an action to enforce a lien claim therefor, appeared in court to defend against the suit, there being no suggestion of insolvency of the defendant or that any other person had an interest in the property, no other or further notice is required, and a judgment properly entered in such a proceeding binds the property as against an assignee in insolvency of the defendant subsequently appointed. *Laughlin* v. *Reed*, 89 Me. 226 (36 Atl. Rep. 131). Where several principal contractors "jointly and severally" agree to build, furnish and complete a building and pay all claims which might become liens thereon, the payment of such claims is a condition precedent to the enforcement of a lien in favor of any such contractors. *Forster Lum. Co.* v. *Atkinson*, 94 Wis. 578 (69 N. W. Rep. 347). As to the rights of a nonsuited plaintiff where several actions to enforce liens are consolidated, see *Kennedy & Shaw Lum. Co.* v. *Dusenbery*, 116 Cal. 124 (47 Pac. Rep. 1008).

Construing and applying Ala. Code 1886, § 3262, it is held that in an an action to enforce mechanics' liens against the interests of several cotenants, the court may order a sale and partition of the land. *Hines* v. *Chicago Bldg. & Mfg. Co.*, 115 Ala. 637 (22 So. Rep. 160). In enforcing an attachment for mechanic's lien against a building on leased lands it will be treated as personal property. Me. Rev. Stat., ch. 81, § 26, applied. *Laughlin* v. *Reed*, 89 Me. 226 (36 Atl. Rep. 131). Mo. Rev. Stat. 1889, §§ 2057, 2075, applied—right of defendant to require definiteness of statement of account *Mitchell Planing Mill Co.* v. *Allison*, 138 Mo. 50 (40 S W. Rep. 118; 60 Am. St. Rep. 544). N. Y. Laws 1885, ch

842; Code Civ. Proc., § 823, construed and applied—right to jury trial—procedure. *Schillinger Fire. Proof C. & A. Co.* v. *Arnott*, 152 N. Y. 584 (46 N. E. Rep. 956). Under Utah Laws 1890, p. 81, ch. 30, § 28, different parties having claims for mechanics' liens may assign them to one of their number for the purpose of enforcing them by one suit. *Culmer* v. *Clift*, Utah (47 Pac. Rep. 85). A provision in Wash. Laws 1893, ch. 24, § 11, that "no person shall begin an action to foreclose a lien upon any property while a prior action begun to foreclose another lien on the same property is pending," and providing for the intervention in such previous action, applies only to prior actions to enforce mechanics' liens. *Nason* v. *Northwestern Mill & P. Co.*, 17 Wash. 142 (49 Pac. Rep. 235).

Sec. 568. Construction of particular statutes. A laborer's lien for wages cannot be enforced under Cal. Stat. 1891, p. 195, unless the wages are payable weekly or monthly. *Spaulding* v. *Mammoth Springs Min. Co.*, Cal. (49 Pac. Rep. 183). For further construction of this statute, see *Kuschel* v. *Hunter*, Cal. (50 Pac. Rep. 897). Construing and applying Ill. Rev. Stat., ch. 82, § 18, which provides that where a contractor who has partially performed his contract is prevented from completely performing it on account of default on the part of the land owner, "he shall be entitled to a reasonable compensation for as much thereof as has been performed, in proportion to the price stipulated for the whole, and the court shall adjust his claim and allow him a lien accordingly," it will be presumed that the contract price for the whole work is reasonable compensation therefor, and hence the reasonable price for a part of the work is in proportion to the price stipulated for the whole. *Sohns* v. *Murphy*, 168 Ill. 346 (48 N. E. Rep. 52). Applying N. C. Code, § 1781, providing for a mechanic's lien which is made superior to a homestead by Const., art. 10, § 4, it is held that when a contractor undertakes to put up a building and complete the same, the contract is indivisible and his lien embraces the entire outlay whether in labor or material. *Broyhill* v. *Gaither*, 119 N. C. 448 (26 S. E. Rep. 31). Va. Code, § 2485, construed and applied — lien for supplies furnished to corporations.

Boston Blower Co. v. *Carman Lum. Co.*, 94 Va. 94 (26 S. E. Rep. 390). Va. Code, § 2475, applied—particular machinery held to be a part of a building so as to entitle the manufacturer to a mechanic's lien. *Haskin Wood-Vulcanizing Co.* v. *Cleveland S. Co.*, 94 Va. 439 (26 S. E. Rep. 878.) The lien for material furnished is given by § 1, ch. 177, Rhode Island Pub. Stat., as amended by public laws, ch. 696, § 1, and not by § 5, ch. 177; and a notice of intention to claim a lien for materials which states that the lien is created by § 5, is fatally defective. *Glynn* v. *Zabriskie*, 19 R. I. 215 (36 Atl. Rep. 8).

Sec. 569. Statutes amended and new statutes. Colorado, Idaho and New Jersey each have a new statute covering the entire subject of mechanics' liens. Colo. Laws 1899, p. 261; Ida. Laws 1899, p. 147; N. J. Laws 1898, pp. 588–553, ch. 226. Sandels & Hill's Ark. Dig., §§ 6251–6253—mechanic's lien against railroads—amended, Laws 1899, p. 145. A recent statute in Arkansas gives laborers and constructers of wells and cisterns a lien on the land "or so much thereof as is necessary to cover the debt." Laws 1899, p. 311. In Arkansas an action to enforce a lien must be commenced within fifteen months after the filing thereof; otherwise the lien fails. Laws 1899, p. 322. Ark. Laws 1899, p. 108—act authorizing sale of property to satisfy mechanic's lien. Cal. Laws 1899, p. 24, amends Cal. Code Civ. Proc., § 1185, concerning the amount of land subject to a mechanic's lien. Cal. Code Civ. Proc., § 1183—property subject to mechanic's lien —when contract must be in writing—amended Laws 1899, p. 33. Conn. Gen. Stat., §§ 3020, 3021—liens of subcontractors —amended, Laws 1899, p. 46. Ind. Rev. Stat. 1894, § 7255 —who may claim a mechanic's lien—amended, Laws 1899, p. 569. Me. Rev. Stat., ch. 91, § 32—dissolution of lien for failure of claimant to file sworn claim in forty days—amended, Laws 1899, ch. 84, p. 94. Minn. Laws 1899, p. 323, defines the duties of contractors before becoming entitled to a lien, or to bring action to recover the amount due under the contract. Nev. Act., Mar. 2, 1875, § 4—priority of mechanics' liens—amended, Laws 1899, p. 98. N. J. Laws 1898, ch. 227, p. 553, repeals sundry acts relative to mechanics' liens. Section four of "An act to secure to mechanics and others

payment for their labor and materials in erecting a building" contained in New Jersey Revision of 1898, is amended by Laws 1899, p. 848. N. Y. Laws 1897, ch. 418, §§ 50–52—lien for stone workers—amended Laws 1899, ch. 822, p. 699. N. C. Laws 1897, ch. 67, § 1, amended by adding provision concerning laborers and others furnishing statements of amounts due them by contractors. Laws 1899, ch. 335, p. 471. N. Dak. Rev. Codes 1895, § 4788—who may have a mechanic's lien, and for what—amended, Laws 1899, p. 150. Oregon Laws 1891, Act Feb. 20, § 1—right of laborers on mining claims to liens—amended, Laws 1899, p. 180. Va. Code, §§ 2476, 2477—perfection of lien by contractor or subcontractor—notice of and extent of lien—amended, Laws 1897–98, p. 487. Utah Rev. Stat. 1898, § 1400—recovery of attorney's fees in action to enforce lien—amended, Laws 1899, p. 81. Wis. Rev. Stat., § 3314—enforcing lien by virtue of contract with one not the owner—amended, Laws 1899, p. 372, ch. 222.

MINES.

EPITOME OF CASES.

Sec. 570. Mining leases. Where a mining lease provides that upon the failure of the lessee to perform his covenants the lease shall terminate, the lessor may maintain ejectment against the lessee without previous demand for possession where he remains in possession after such forfeiture. *Kirk* v. *Mattier*, 140 Mo. 23 (41 S. W. Rep. 252). Where a mining lease stipulates for the payment of certain rent and royalty at fixed intervals and provides that upon nonpayment, according to the terms of the lease, it shall be null and void, it is held that the failure to make the payments as required, operates as a forfeiture upon which the lessor or his grantees may re-enter, or bring ejectment. N. J. Gen. Stat., Vol. 1, p. 880, §§ 135, 136, construed and applied. *Boys* v. *Robinson*, 61 N. J. L. 179 (38 Atl. Rep. 813). A covenant in a mining lease, to mine a specified quantity of ore each year, or, upon failure to do so, to pay

the royalty upon that amount, imposes an obligation to pay for the stipulated quantity of ore whether mined or not; not whether it existed or not. It is not a covenant to pay royalty whether the ore existed or not, but one to pay royalty if the ore exists whether mined or not; hence, the nonexistence of the ore is a defense to an action to recover the royalty. *Diamond Iron-Min. Co.* v. *Buckeye Iron-Min. Co.*, 70 Minn. 500 (73 N. W. Rep. 507). An agreement by a lessor in a mining lease to accept a reduced royalty in order to enable the lessee to continue operations and prevent a forfeiture of the lease, is based upon a valuable consideration. *Sargent* v. *Robinson*, 17 Ind. App. 411 (46 N. E. Rep. 925). Particular instrument construed and held to be a mining lease and not a mere mining license. *Kirk* v. *Mattier*, 140 Mo. 23 (41 S. W. Rep. 252). For construction of particular condition in a lease reserving a lien "on all ore mined" to secure the payment of royalty. *Iron Duke Mine* v. *Braastad*, 112 Mich. 79 (70 N. W. Rep. 414). For construction of particular mining leases as to the right to royalties, see *Coalsdale Min. & Mfg. Co.* v. *Clark*, 43 W. Va. 84 (27 S. E. Rep. 294); *Wright* v. *Warrior Run Coal Co.*, 182 Pa. St. 514 (38 Atl. Rep. 491). Minnesota has a statute regulating the leasing of mineral land belonging to persons under guardianship. Laws 1899, p. 147.

Sec. 571. Oil and gas leases—Construction. Construing an oil and gas lease in which the lessee covenanted to complete one well within a specified time or to pay a certain monthly rental in case of his failure to do so, the failure to do either to annul the lease, and the lessee "having the option to drill said well or not, or pay said rental or not, as he may elect," it is held that the lessee must either drill the well or pay the rent and he cannot escape liability by refusing to do either. *Jackson* v. *O'Hara*, 183 Pa. St. 233 (38 Atl. Rep. 624). Where the the lease provides for the payment to the lessor of a certain portion "of the profits realized from the oil or gas," the word "profits," means the net amount realized over and above all expenses. *Poterie Gas Co.* v. *Poterie*, 179 Pa. St. 68 (36 Atl. Rep. 232). For construction of particular oil lease as to the right to royalties and defense to an action therefor,

see *Swint* v. *McCalmont Oil Co.*, 184 Pa. St. 202 (38 Atl. Rep. 1021; 68 Am. St. Rep. 791). Particular affidavit of defense to an action for bonus under an oil lease held insufficient. *Chambers* v. *Smith*, 188 Pa. St. 122 (38 Atl. Rep. 522). For construction of particular oil and gas leases, see *Poterie Gas Co.* v. *Poterie*, 179 Pa. St. 68 (36 Atl. Rep. 232); *Kokomo Nat. Gas & Oil Co.* v. *Albright*, 18 Ind. App. 151 (47 N. E. Rep. 682); *Bettman* v. *Harness*, 42 W. Va. 433 (26 S. E. Rep. 271; 36 L. R. A. 566).

Sec. 572. Oil and gas leases—Forfeiture—Abandonment. Where an oil and gas lease provides for its forfeiture in case the lessee does not begin operations within a specified number of days, he is entitled to the benefit of the full length of time in which to begin operations. *Henderson* v. *Ferrell*, 188 Pa. St. 547 (38 Atl. Rep. 1018). Where an oil lease provides for the payment of a stipulated rent each month until work is commenced and for a forfeiture of the lease if certain work is not done within a specified time, the provision for the forfeiture is for the benefit of the lessor and until he elects to enforce it, the lessee's liability to pay rent continues. *Mathews* v. *People's Nat. Gas. Co.*, 179 Pa. St. 165 (36 Atl. Rep. 216) Where a lease, "for the sole and only purpose of drilling and operating for petroleum oil and gas for the term of twenty years or as long thereafter as oil and gas is found in paying quantities," which specifies the time when the lessee shall begin operation, which is subsequently extended, a failure of the lessee to commence operations for more than seven years was held to create a presumption of his abandonment of the lease, and a court of equity may entertain a suit to cancel it. *Crawford* v. *Ritchey*, 43 W. Va. 252 (27 S. E. Rep. 220). Particular evidence held sufficient to show an abandonment of an oil lease. *Stage* v. *Boyer*, 188 Pa. St. 560 (38 Atl. Rep. 1035). A purchaser from a lessor in an oil lease with knowledge of the existence of the lease, is bound by a parol agreement between the parties to it as to what shall constitute due diligence or abandonment, although such purchaser did not have knowledge of the existence of such agreement. *Venture Oil Co.* v. *Fretts*, 152 Pa. St. 451 (25 Atl. Rep. 732), distinguished. *Bartley* v. *Phillips*, 179 Pa. St. 175 (36 Atl.

Rep. 217). Where an oil and gas lease is silent as to the number of wells to be drilled, there is an implied covenant that the lessee shall reasonably develop the lands by drilling and operating such number of wells as would be ordinarily required for the production of the oil contained in such lands and afford ordinary protection to the lines; but a breach of such implied covenant does not have the effect to forfeit the lease in whole or in part, nor is it a good cause for a court to declare such forfeiture, unless the lease in express terms provides that it shall be avoided or forfeited by the breach of such implied covenant. Under such a lease the remedy for a breach of the implied covenant, is an action for damages. *Harris* v. *Ohio Oil Co.*, 57 O. St. 118 (48 N. E. Rep. 502).

Sec. 573. Rights of a life tenant. A life tenant has no right to operate for oil or gas or to lease the land to another to make oil or gas operations, unless the operations for oil or gas are commenced before the life estate accrued. *Marshall* v. *Mellon*, 179 Pa.St. 371 (36 Atl. Rep. 201; 57 Am. St. Rep. 601; 35 L. R. A. 816). The same is held by the court of appeals of Kentucky, especially following and approving the case of *Koen* v. *Bartlett*, 41 W. Va. 559, epitomized at length in Ballards' Law of Real Prop., Vol. V, § 522, *Gerkins* v. *Kentucky Salt Co.* Ky. (39 S. W. Rep. 444); and in this case it is held that a mining company which commenced original operations for natural gas upon land under a lease from the owner of a life estate therein and with the consent of a portion of the remainder men, at a large expense to itself, could only continue its operations by the payment of a fair royalty to the remainder men, after having been reimbursed for any improvements made on the land. A widow holding under the statute a one-third part of her intestate's realty for life may enforce an accounting under Pa. Act, April 25, 1850, against the purchasers from the heirs of the other two-thirds on account of minerals taken by them from the premises. *McGowan* v. *Bailey*, 179 Pa. St. 470 (36 Atl. Rep. 325).

Sec. 574. Separate ownership of surface estate and mineral estate. The owner of a mineral land may, by mining operations thereon, create a severance of the mineral

estate from the surface estate, and in such a case the title of one having notice of such operations, acquired by adverse possession of the surface estate, does not include the minerals under it. *Delaware & H. Canal Co.* v. *Hughes*, 183 Pa. 66 (38 Atl. Rep. 568; 63 Am. St. Rep. 743; 38 L. R. A. 826).

MORTGAGES.

EPITOME OF CASES.

Sec. 575. What constitutes a mortgage—Validity. Particular transaction held to constitute a mortgage. *Trogdon* v. *Walston*, 164 Ill. 144 (45 N. E. Rep. 575). In Alabama, it is held that a husband may execute a purchase money mortgage without his wife joining with him, *Stanley* v. *Johnson*, 118 Ala. 344 (21 So. Rep. 823); but a mortgage without attestation or acknowledgment is inoperative to vest title to the land in the mortgagee. *Watson* v. *Herring*, 115 Ala. 271 (22 So. Rep. 28). Where a duly executed mortgage was submitted to the mortgagee for his inspection and he returned it to the mortgagor with instructions to have it recorded, there was held to be a sufficient delivery. *Herman* v. *Clark*, Tenn. (39 S. W. Rep. 878). A mortgage will not be held invalid because a blank is left where the name of the mortgagee ordinarily appears, if the description of the indebtedness given and the other recitals in the mortgage clearly designate the mortgagee. *Richey* v. *Sinclair*, 167 Ill. 184 (47 N. E. Rep. 364). Citing, *Beaver* v. *Slanker*, 94 Ill. 177; *Bay* v. *Posner*, 78 Md. 42 (26 Atl. Rep. 1084). A mortgage to secure a preexisting debt of a third person given with a new loan made to him, is based upon a sufficient consideration. *Mayberry* v. *Nichol*, Tenn. (39 S. W. Rep. 881). Cal. Const., art. 13, § 5, making void, contracts for the payment of taxes upon money loans, does not invalidate a provision in a deed given to secure debts for the repayment of all taxes upon the land. *Barnhart* v. *Edwards*, Cal. (47 Pac. Rep. 251). A mortgage taken to secure the repayment of money loaned at interest by one engaged in the business of

loaning money at interest is valid although the mortgagee has not complied with Idaho Rev. Stat., § 1644, requiring persons engaged in such business to obtain a license. *Vermont Loan & T. Co.* v. *Hoffman*, Idaho (49 Pac. Rep. 814; 37 L. R. A. 509). For an extended statement of this case, see chapter on Contracts, § 119. A mortgage executed on a certain day to secure the mortgagee from loss on account of an endorsement of the mortgagor's note, is not invalid because given to secure a debt which was "made or contracted after the execution and delivery of the mortgage," under New Hampshire Pub. Stat., ch. 139, § 8, where the endorsement of the note was made on the next day. *Stavers* v. *Philbrick*, N. H. (36 Atl. Rep. 16). Where a person has loaned money to a mortgagor, and claims an equitable right to share in the security of the mortgage, to which he is not a party, he must establish, by the weight of evidence, that all the persons interested as mortgagors and mortgagees agreed that he also should be secured by the mortgage. This agreement must precede or coincide in point of time with the advancement of the money loaned. A promise made to the loaner, after he has advanced the money, that he may share in the security of the mortgage, is voluntary and without consideration, and cannot be enforced. *Boney* v. *Williams*, 55 N. J. Eq. 691 (38 Atl. Rep. 189).

Sec. 576. Alterations in mortgages. A material alteration of a mortgage without the consent of the mortgagor renders it void; but such alteration does not void the note or evidence of the debt for the payment of which the mortgage is security. *Kime* v. *Jesse*, 52 Neb. 606 (72 N. W. Rep. 1050). Filling a blank in a note secured by a deed of trust by writing after the words "interest payable" the word "semi-annually," is held to be a material alteration, but where such alteration was innocently made for the purpose of correcting a mistake and making the instrument conform to the agreement of the parties without any fraudulent intent, and it appears that no one was injured by filling in the blank left for that purpose, the instrument is not annulled nor the debt extinguished. *McClure* v. *Little*, 15 Utah 379 (49 Pac. Rep. 298; 62 Am. St. Rep. 938).

Sec. 577. Description of the debt secured. A deed for land, retaining a lien for purchase money, or mortgage, or deed of trust, must in some way describe the debt, so as to identify it. Literal accuracy is not required. Substantial accuracy, reasonably describing, is sufficient. The description of the charge must be correct as far as it goes, so as to inform creditors and subsequent purchasers what amount is charged on the land, and must be full enough to direct attention to the sources of correct information, and be such a description of the debt as not to mislead or deceive as to its nature and amount. *Goff* v. *Price*, 42 W. Va. 884 (26 S. E. Rep. 287). Citing, *Bowen* v. *Ratcliff*, 140 Ind. 393 (39 N. E. Rep. 860; 49 Am. St. Rep. 208, and note). A mere recital in a mortgage that the mortgagor is "justly indebted" to the mortgagee in a certain sum, evidenced by a certain number of promissory notes, each for a specified sum, is not sufficient to support a promise to pay the amounts mentioned, and as to the notes which are never executed the promise will be treated as resting in parol. *Coleman* v. *Fisher*, Ark. (41 S. W. Rep. 49).

Sec. 578. Equitable mortgages. A security deed, void because of usury, does not create an equitable mortgage. *Beach* v. *Lattner*, 101 Ga. 857 (28 S. E. Rep. 110). A deposit of a bond for a deed by a debtor as collateral security for a loan, accompanied by a written instrument reciting that the deposit is made "to secure any indebtedness that may appear or shall come against me in any way," is held to be an equitable mortgage to which a surety may be subrogated, *Hackett* v. *Watts*, 138 Mo. 502 (40 S. W. Rep. 113). A contract in writing to secure a debt which is duly specified therein, in which the parties expressly declare their intention to create a lien, by way of mortgage, upon certain real estate particularly mentioned and described in the writing, upon the failure of certain conditions fully set forth in the contract, is an equitable mortgage, and, upon non-payment and breach of the conditions, may be foreclosed in the ordinary way in a court of equity, and the interest of the mortgagors in the land so pledged sold to satisfy the debt. *Cummings* v. *Jackson*, 55 N. J. Eq. 805 (38 Atl. Rep. 763).

Sec. 579. Construction of mortgages. A deed of trust given to secure purchase money, on land bought and "the crop of cotton, corn and other produce to be raised by us and our employes during the year 1890," is held to embrace the crop on no other land than that conveyed. *Pettis* v. *Sullivan*, Miss. (21 So. Rep. 607). Where, at the time the mortgage is executed, the mortgagee takes from the mortgagor a conveyance of certain lands, under an agreement reciting that he is to sell such lands for the best price that he can obtain, and, after deducting costs and expenses and reasonable charges for selling the same to apply the proceeds upon the mortgage, the mortgagee becomes a trustee as to such lands for the mortgagor, and if, by delay in the nonperformance of his duties the lands are lost to the mortgagor by reason of tax sales, such mortgagee is chargeable with their value to be applied upon his mortgage. *A. P. Cook Co.* v. *Bell*, 114 Mich. 283 (72 N. W. Rep. 174). Where it is declared by a similar clause inserted in two several mortgages "that each shall be paid proportionately out of any proceeds from sale, judicial or otherwise, of the said premises," the contract of concurrency is limited to the equal sharing of the things mortgaged and does not intend to require the several debts secured to be equally paid from other sources than the mortgaged property. If payments be voluntarily made to one mortgagee, which do not appear to have been raised from the mortgaged property, the other cannot maintain a claim to be allowed out of that property a preferential payment, to equalize proportionately the debts secured. *McInnes* v. *Mc Innes Brick Mfg. Co.*, N. J. Eq. (38 Atl. Rep. 182). For construction of particular mortgage, see *Bachmeier* v. *Bachmeier*, 69 Minn. 472 (72 N.W. Rep. 710). For construction of particular agreement by which the mortgagor gave the mortgagee the right to the use and possession of a portion of the mortgaged premises, see *McAbee* v. *Harrison*, 50 S. C. 89 (27 S. E. Rep. 539).

Sec. 580. Title and right to possession. A mortgagor whose mortgage has not been foreclosed, although it purports to convey his "legal and equitable estate," who is the equitable owner of the land, may compel conveyance of

the legal title and a surrender of possession. *Lackey* v. *Martin*, 120 N. C. 391 (27 S. E. Rep. 85). A mortgagor of real estate cannot, without the consent of the mortgagee, give a third party authority to erect buildings on the mortgaged property so that such third party can hold the buildings against the mortgagee or his assignee. *Ekstrom* v. *Hall*, 90 Me. 186 (38 Atl. Rep. 106). Citing, *Wight* v. *Gray*, 73 Me. 297; *Meagher* v. *Hayes*, 152 Mass. 228 (25 N. E. Rep. 105; 23 Am. St. Rep. 819). A mortgagee cannot assert a right against one in possession of land holding adversely, that could not be asserted by the mortgagor if the mortgage had not been made. *Schafer* v. *Hauser*, 111 Mich. 622 (70 N. W. Rep. 136; 66 Am. St. Rep. 403; 35 L. R. A. 835). Where one to whom land has been transferred to secure a loan takes an assignment of a lease from a lessee in possession, he will be treated as a mortgagee in possession. *Barnhart* v. *Edwards*, Cal. (47 Pac. Rep. 251).

In Alabama after the maturity of a mortgage, a mortgagee becomes the owner of the land with the legal title and can recover possession upon this title in a suit in ejectment. *Stanley* v. *Johnson*, 118 Ala. 344 (21 So. Rep. 828). Under Miss. Code 1892, § 2768, a mortgagee remaining in possession for ten years after condition broken, acquires a perfect title by limitation. *Tuteur* v. *Brown*, 74 Miss. 774 (21 So. Rep. 748). Under Neb. Comp. Stat. 1897, ch. 73, § 55, a mortgage "is a mere pledge for the payment of the debt or performance of an obligation." The mortgagor retains the right to possession and rents and profits until confirmation of the foreclosure sale. He is the owner of the land and the mortgage is a mere security for the debt. The land thus mortgaged descends to his heirs as real estate and may be devised as such; and it may be sold on execution against the mortgagor, the purchaser taking such title and right as were in the judgment debtor at the time the lien of the judgment attached to the land. *Orr* v. *Broad*, 52 Neb. 490 (72 N. W. Rep. 850). Applying Utah Comp. Laws 1888, § 3474, providing that "a mortgage of real property shall not be deemed a conveyance whatever its terms, so as to enable the owner of the mortgage to recover possession of the real property, without a foreclosure and sale," it is held that a mortgage of real property does not vest its title in

the mortgagee and the mortgagor may convey the title subject to the lien to a third party. *Thompson* v. *Cheezman*, 15 Utah 48 (48 Pac. Rep. 477). In Vermont after the law day has passed without performance or payment by the mortgagor, the fee in the mortgaged premises becomes vested in the mortgagee, and his subsequent conveyance of the mortgaged premises containing the usual covenants of warranty passes the mortgaged premises together with whatever rights he then holds or may thereafter acquire. *Oakman* v. *Walker*, 69 Vt. 344 (38 Atl. Rep. 63). Upon an elaborate review of the statutes and decisions of Wisconsin, it is held by the supreme court of that state that under its territorial statutes of 1839, a real estate mortgage, till after the extinguishment of the equity of redemption in the manner provided by law, vested in the mortgagee a mere lien, and that a taking possession even of the mortgaged premises did not operate to vest the legal title to the land mortgaged in the mortgagee. The mortgagor can only surrender his estate by deed or conveyance in writing and he cannot extinguish it by an instrument referring to his deed from the mortgagee, and his mortgage to him, and reciting that "by consent and agreement of the parties to said instruments they are hereby cancelled and held for naught." Wis. Rev. Stat. 1889, p. 257, § 53; p. 181, § 20; p. 314, § 19; p. 162, § 6, construed and applied. *Slaughter* v. *Bernards*, 97 Wis. 184 (72 N. W. Rep. 977).

Sec. 581. Power of mortgagor to revive mortgage barred by the statute of limitations. A mortgagor has no power to revive a mortgage after the bar of the statute of limitations has become complete, as against a purchaser of the land who is not obligated to pay the debt. *Damon* v. *Lequc*, 17 Wash. 573 (50 Pac. Rep. 485; 61 Am. St. Rep. 927). The court say: "The mortgagor could no more revive the mortgage in such a case than he could give a new mortgage upon the land. 2 Jones, Mortg. (5th Ed.), §§ 1198, 1202; Wilts. Mortg. Forec. (Enlarged Ed.), §§ 65, 410; 18 Am. & Eng. Enc. Law, p. 760; *Schmucker* v. *Sibert*, 18 Kan. 104 (26 Am. Rep. 765); *Day* v. *Baldwin*, 34 Ia. 380; *Cottrell* v. *Shepherd*, 86 Wis. 649 (57 N. W. Rep. 983; 39 Am. St. Rep. 919); *Trustees* v. *Smith*, 52 Conn. 484; *Kendall* v. *Clark*,

90 Ky. 178 (13 S. W. Rep. 583); *Zoll* v. *Carnahan*, 83 Mo. 35; *Newbould* v. *Smith*, 33 Ch. Div. 127; *Lord* v. *Morris*, 18 Cal. 482. There are some cases holding the contrary doctrine, on the ground that a purchaser of the land who buys while the mortgage is in force is placed in no worse position by a revivor of a mortgage than he was in when he purchased. But the greater number of cases as well as the weight of authority, are against it. The statute of limitations is a statute of repose, and it would seem as though it should apply in this kind of a case as well as any other, and that a mortgagor, perhaps insolvent, should not have the power, many years after the bar of the statute had become complete, to revive a mortgage undischarged of record, and make the same a charge upon the lands, as against a subsequent purchaser, when evidence of payment or other defenses might have become lost."

Sec. 582. Purchase of mortgagor's equity of redemption by mortgagee. It is held that it is not fraud or a violation of a fiduciary relation for a mortgagee to purchase the mortgagor's equity of redemption, as cheaply as he can after the mortgage has been foreclosed. *De Martin* v. *Phelan*, 115 Cal. 538 (47 Pac. Rep. 356; 56 Am. St. Rep. 115). It is somewhat difficult to reconcile this opinion with the previous statement of the equitable principles on this subject made in the case of *Bradbury* v. *Davenport*, 114 Cal. 598 (46 Pac. Rep. 1062; 55 Am. St. Rep. 92; see Ballards' Law of Real Property, Vol. V, § 763).

Sec. 583. After-acquired property. A mortgage given to cover after-acquired property is subject to a purchase money mortgage given at the time of its acquisition. *Daly* v. *New York & G. L. Ry. Co.*, 55 N. J. Eq. 595 (38 Atl. Rep. 202). A mortgage by a railroad company to secure bonds, which declares that it shall include all property acquired and to be acquired, operates upon after-acquired property as soon as it is obtained; and persons holding bonds secured by such a mortgage cannot have their rights postponed in favor of a claim for reimbursement by one who has acquired lands for a right of way for the railroad subsequent

to the execution of the mortgage. *Frost* v. *Harms*, 167 Ill. 161 (47 N. E. Rep. 357).

Sec. 584. Mortgage to secure advances. A mortgage to secure future advances is valid as to the mortgagor and also as to third parties. *Union Nat. Bank* v. *Milburn & Stoddard Co.*, 7 N. Dak. 201 (73 N. W. Rep. 527). If a mortgage was intended to secure future advances or liability to be thereafter incurred, and is broad enough in its terms to cover them, it is not, for that reason, rendered invalid as a security for debts or liability existing at the time of its execution. *Stavers* v. *Philbrick*, N. H. (36 Atl. Rep. 16). Where one who has made advancements to a mortgagor with which to pay interest and taxes in pursuance of a general understanding that he is to have his money when the land is sold, subsequently procures an assignment of the mortgage, he cannot hold it as security for the advancements made before the date of the assignment, in the absence of an express agreement to that effect. *Brooks* v. *Brooks*, 169 Mass. 88 (47 N. E. Rep. 448). A mortgage given to secure advances has priority over a subsequent judgment against the mortgagor, as to all advances made before the mortgagee has notice of the judgment and as to subsequent renewal notes given for such advances. In such a case verbal notice of the existence of the judgment is sufficient. *Schmidt* v. *Hedden*, N. J. Eq. (38 Atl. Rep. 843). Particular evidence held insufficient to show that a mortgage was given to secure future advances. *Barnhart* v. *Edwards*, Cal. (47 Pac. Rep. 251). For construction of a particular mortgage as to the obligation of the mortgagee to make future advances and the measure of damages for his failure to do so, see *Graham* v. *McCoy*, 17 Wash. 63 (48 Pac. Rep. 780).

Sec. 585. Deeds construed as mortgages. Where the relation of debtor and creditor exists between the parties and the object of a conveyance between them is to secure a debt, it will be treated as a mortgage. *Campbell* v. *Linder*, 50 S. C. 169 (27 S. E. Rep. 648). Where an absolute conveyance, although given as a security only, is fraudulent as to creditors, a court of equity will not declare it a mortgage.

Patnode v. *Darveau*, 112 Mich. 127 (70 N. W. Rep. 489). Where, upon an administrator's sale, he charges himself with the price of the land and conveys it by an absolute deed to a third person, who loans money to the administrator as an individual and agrees to reconvey the land to him upon repayment of the money, it is held that the transaction will not be treated as a mortgage. Furches, J., dissenting. *Gorrell* v. *Alspaugh*, 120 N. C. 862 (27 S. E. Rep. 85). Where, at the time of the execution of an absolute deed from a debtor to his creditor, it is agreed in a separate instrument that the deed is to be surrendered if the debt be paid at maturity, and if not so paid the deed is to be recorded and the property belong to the grantee the transaction constitutes a mortgage. *Kelton* v. *Brown*, Tenn. - (39 S. W. Rep. 541). Where a deed absolute on its face is shown by evidence and surrounding circumstances to be a mortgage, and the grantor, in order to redeem the property, borrows the money from a third party, and the grantee in said deed, by endorsement thereon, assigns the deed to the grantor, and the grantor, by like assignment, transfers the property to said third party, the deed may still be shown by evidence and the circumstances to be a mortgage to secure said third party the money advanced by him to said grantor. *Shank* v. *Groff*, 43 W. Va. 337 (27 S. E. Rep. 340). Where the progenitors of a land improvement scheme, one of whom is the legal adviser of an aged capitalist, induced the latter to advance funds with which to carry on their enterprise, the amount of which largely exceed the representations made to him, and in order to complete the building operations which had been begun and protect himself from serious loss it is necessary for him to advance additional sums, which he does and takes a deed to the property, after the completion of the improvements, a court of equity will not construe such a deed to be a mortgage. *Doying* v. *Chesebrough*, N. J. Eq. (36 Atl. Rep. 893). Where one who has executed a deed intended as a mortgage accepts from his grantee a lease giving him a right to purchase at any time during the term, his equitable interest as a mortgagor is changed to an option to purchase. *Doying* v. *Chesebrough*, N. J. Eq. (36 Atl. Rep. 893).

In Georgia it is provided by statute, Act Nov. 12, 1889;

Laws 1889, p. 118, "that, in all cases where property may have been or may hereafter be conveyed to secure a debt, the surrender and cancellation of such deed, in the same manner that mortgages are now cancelled, on payment of such debt to any person legally authorized to receive the same, shall operate to reconvey the title to said property to the grantor, his heirs, executors, administrators or assigns." *Pirkle* v. *Equitable Mortg. Co.*, 99 Ga. 524 (28 S. E. Rep. 34). See opinion for construction of this statute; and also *Marshall* v. *Hodgkins*, 99 Ga. 592 (27 S. E. Rep. 748); *Pirkle* v. *Equitable Mortg. Co.*, 99 Ga. 524 (28 S. E. Rep. 34). Ga. Laws 1893, p. 117, construed and applied—absolute conveyance as a mortgage—reconveyance and sale of property on execution. *Burckholder* v. *Planters' Loan & Sav. Bank*, 100 Ga. 428 (28 S. E. Rep. 236).

Sec. 586. Deeds construed as mortgages—Absolute deed creating a trust. Where a solvent person executed to another an absolute deed of property and at the same time there was a separate agreement between them in which it was stipulated that the grantee was to manage, control and dispose of the property as a trustee of the grantor for the payment of his debts, any balance remaining to be returned to him, his heirs, executors or assigns, it is held that the deed and agreement did not constitute a mortgage but passed the absolute title to the land. *Ladd* v. *Johnson*, 32 Or. 195 (49 Pac. Rep. 756). The court: "It is clear from the declaration of trust accompanying the conveyance that the transaction was intended by the parties as an unconditional conveyance to the plaintiff for the purpose of raising a fund to pay the grantors's debts then existing, between which and a mortgage or deed of trust in the nature of a mortgage there is a well-recognized distinction. In the one case the grantor parts absolutely with his title, and it vests in the grantee for the purposes of the trust. In the other the conveyance is conditional and subject to be defeated by performance on the part of the grantor. A mortgage or deed of trust in the nature of a mortgage is intended as security for the payment of money, or for the performance of some collateral act, and becomes void upon such payment or perform-

ance, *Wing* v. *Cooper*, 37 Vt. 179; *Mitchell* v. *Burnham*, 44 Me. 299; *Harrington* v. *City of Port Huron*, 86 Mich. 46 (48 N. W. Rep. 641; 13 L. R. A. 664); *Newman* v. *Samuels*, 17 Ia. 528; while a deed of trust of the character under consideration here is an absolute and indefeasible conveyance of the whole of the grantor's title, for the purpose expressed. The former, whatever the form of the instrument, or whatever name may be given it by the parties, creates a mere lien, while the latter conveys title. * * * The distinction between such an instrument and a mortgage or deed of trust designed as security for a debt is everywhere recognized, and is pointed out with clearness in the following authorities. 2 Pom. Eq. Jur., § 995; *Kinney* v. *Heatley*, 18 Or. 45 (7 Pac. Rep. 859); *Flagg* v. *Walker*, 5 Sup. Ct. Rep. 697; *Hoffman* v. *Mackall*, 5 O. St. 124 (64 Am. Dec. 637); *Woodruff* v. *Robb*, 19 Ohio 212; *Turner* v. *Watkins*, 31 Ark. 429; *Soutter* v. *Miller*, 15 Fla. 625; *Title Guarantee & Trust Co.* v. *Northern Counties Investment Trust*, 73 Fed. Rep. 931; *Catlett* v. *Starr*, 70 Tex. 485 (7 S. W. Rep. 844); *Newman* v. *Samuels*, 17 Ia. 528; *McDonald* v. *Graham*, 30 Kan. 170 (2 Pac. Rep. 507)."

Sec. 587. Action to declare deed a mortgage—Sufficiency of proof. Where a bill, to declare an absolute conveyance a mortgage, does not recognize or offer to perform all the contracts embraced in the transaction which as a whole constituted a mortgage, the bill should be dismissed. *Jeffery* v. *Robbins*, 167 Ill. 375 (47 N. E. Rep. 725). An absolute deed may be shown to be a mortgage by parol evidence. *Shank* v. *Groff*, 43 W. Va. 337 (27 S. E. Rep. 340); *Book* v. *Beasley*, 138 Mo. 455 (40 S. W. Rep. 101); *Jones* v. *Cullen*, 100 Tenn. 1 (42 S. W. Rep. 878). Either a grantee or grantor in an absolute deed may show it to be a mortgage, but the burden of proof is on the one who seeks to change its character. *Kellogg* v. *Northup*, 115 Mich. 327 (73 N. W. Rep. 230). The unsupported testimony of a grantor, when denied by the grantee, is not sufficient to show an absolute deed to be a mortgage. *Runyon's Adm'r* v. *Pogue*, Ky. (42 S. W. Rep. 910). Where the evidence as to the conduct, declarations and pecuniary condition of the grantor confirm the presumption attach-

ing to an instrument in the form of an absolute deed, it should not be declared a mortgage. *Peres* v. *Crocker*, Cal. (47 Pac. Rep. 928). Particular cases in which the evidence is held sufficient so show an absolute deed to be a mortgage. *Campbell* v. *Linder*, 50 S. C. 169 (27 S. E. Rep. 648); *Kramer* v. *Brown*, 114 Ala. 612 (21 So. Rep. 817); *Book* v. *Beasley*, 138 Mo. 455 (40 S. W. Rep. 101); *Meeker* v. *Shuster*, Cal. (47 Pac. Rep. 580); *Bowman* v. *Felts*, Tenn. (42 S. W. Rep. 810); *Jeffery* v. *Robbins*, 167 Ill. 375 (47 N. E. Rep. 725). Particular evidence held insufficient to show an absolute deed to be a mortgage. *Peres* v. *Crocker*, Cal. (47 Pac. Rep. 928); *Shultes* v. *Stivers*, 66 Minn. 517 (69 N. W. Rep. 639).

Where a mortgagor, upon maturity of his obligation, conveys the property absolutely to his mortgagee, who releases the mortgage and executes an agreement to reconvey if the mortgagor shall pay a certain sum within a specified time, during which time it is provided that the mortgagor may remain in possession paying a fixed sum each month as interest, the transaction will not be construed a mortgage in the absence of clear, certain and conclusive proof that such was the intention of the parties. *Sullivan* v. *Woods*, Ariz. (50 Pac. Rep. 118). The court say: "When there is a substantial conflict in the evidence, a mere preponderance of evidence is insufficient to prove that an absolute deed was a mortgage. It must be shown that it was executed, delivered and accepted and intended as a mortgage by clear and certain and conclusive evidence. *Perot* v. *Cooper*, 17 Colo. 80 (28 Pac. Rep. 891; 31 Am. St. Rep. 258). 'When the written papers do not show that security was meant, it is incumbent upon the party seeking to establish a mortgage to show that a mortgage was intended.' *Gassert* v. *Bogk*, 7 Mont. 585 (19 Pac. Rep. 281). 'For a deed absolute on its face, to be declared a mortgage, the testimony must establish a clear case.' *Ganceart* v. *Henry*, 98 Cal. 281 (33 Pac. Rep. 92); *Henley* v. *Hotaling*, 41 Cal. 22; *Hanford* v. *Blessing*, 80 Ill. 188. 'A deed absolute on its face given by A. to B. for real estate therein described, and a bond given by B. to A. agreeing to convey to A. a portion of the same property at a stipulated time, although given on the same date, and for the same

price, if not intended to be a mortgage, or security for money, by the parties themselves, and not appearing to be such on the face of the instruments, held to be an absolute bargain and sale, and not a mortgage.' *Winters* v. *Swift*, 2 Idaho 60 (8 Pac. Rep. 15). 'To justify a court of equity in holding a deed absolute on its face to have been intended by its parties as a mortgage simply, the proof should be clear and satisfactory.' *Canal Co.* v. *Crawford*, 11 Or. 248 (4 Pac. Rep. 118). 'One, who in the absence of fraud or false representations, has executed to a creditor a deed to certain property, and retained possession under a lease, the deed and lease providing that the premises should be reconveyed to the tenant upon his payment of the rent and the debt which these intsruments were given to secure, is estopped to deny such landlord's title in action brought to recover the rent.' *Knowles* v. *Murphy*, 107 Cal.107 (40 Pac. Rep. 111)."

Sec. 588. Priority of mortgage. A mortgagee having a lien prior to the lien of general creditors, loses his priority, where, after their lien has attached to the mortgagor's equity of redemption, he executes an absolute release of his mortgage in order to enable the mortgagor to sell the premises and subsequently takes in payment of his debt, in pursuance of an agreement with the mortgagor at the time the mortgage was satisfied, an assignment of purchase money notes given by the mortgagor's purchaser, which are secured by a vendor's lien. *Bridges* v. *Cooper*, 98 Tenn. 381 (39 S. W. Rep. 720). The lien of a mortgagor's widow for a year's support, given by the statute of Georgia, attaches only to his equity of redemption, and in case of sale of the premises the mortgage debt is to be first paid. *Burckhalter* v. *Planters' Loan & Sav. Bank*, 100 Ga. 428 (28 S. E. Rep. 236). A mortgage to secure an antecedent debt which is filed before an actual entry of a judgment which was filed soon after on the same afternoon, will not have priority over the judgment but their liens will be equal. *Goetzinger* v. *Rosenfeld*, 16 Wash. 392 (47 Pac. Rep. 882; 38 L. R. A. 257). A mortgagee of a vendee of lands, the legal title to which is held by his vendor subject to the performance of certain conditions, takes subject to such conditions. *Allemania Loan & Bldg. Co. No. 2* v. *Frantzreb*, 56 O. St.

493 (47 N. E. Rep. 497). When an agreement has been made that a mortgage shall be subject and subordinate to a subsequent lease of the same lands, provided and so long as certain payments mentioned in the agreement are made on the mortgage, a failure to make such payments will *ipso facto* restore the priority of the mortgage. *Cummings* v. *Jackson*, 55 N. J. Eq. 805 (38 Atl. Rep. 768). A court of equity will grant relief against a priority acquired by fraud, of which the agent of the mortgagee claiming priority had notice. *Ennesser* v. *Hudek*, 169 Ill. 494 (48 N. E. Rep. 673). One holding under a mortgage which recognizes that it is subject to a prior mortgage, cannot gain priority over such other mortgage by assailing it upon the ground that it is fraudulent as to the mortgagor's creditors; but he may relinquish his right to claim under his mortgage and assail such other mortgage as a creditor. *Old National Bank* v. *Heckman*, 148 Ind. 490 (47 N. E. Rep. 953). Where property subject to two mortgages is conveyed by the mortgagor to the holder of the first mortgage, the junior mortgage is superior to a subsequent mortgage given by such grantee. *Hitchcock* v. *Nixon*, 16 Wash. 281 (47 Pac. Rep. 412). A subsequent incumbrancer is not entitled to priority over a prior indemnity mortgage because its recitals do not show its real character, but on its face it is conditioned absolutely to pay the note referred to. *Steen* v. *Stretch*, 50 Neb. 572 (70 N. W. Rep. 48). Where buildings, subject to the lien of a mortgage upon the land on which they are situated, are removed by a subsequent purchaser and mortgaged to an innocent third party, the lien of the original mortgage has priority to the extent the land is not sufficient to satisfy the debt it secures. *Johnson* v. *Bratton*, 112 Mich. 319 (70 N. W. Rep. 1021).

Sec. 589. Priority of purchase money mortgage. A purchase money mortgage given at the time property is acquired has priority over a previous mortgage by the purchaser which was to cover after-acquired property. *Daly* v. *New York & G. L. Ry. Co.*, 55 N. J. Eq. 595 (38 Atl. Rep. 202). One who takes a mortgage from a vendee, before his title deed is recorded, takes subject to a prior unrecorded purchase money mortgage given at the time of the purchase and

subsequently recorded at the same time as the title deed. *Continental Inv. & L. Soc.* v. *Wood*, 168 Ill. 421 (48 N. E. Rep. 221). The priority of a purchase money mortgage over a mortgage given by a vendee to secure a loan of money with which to make improvements, may be postponed by a parol agreement between the holders of such liens, and one taking an assignment of the purchase money notes with knowledge of such agreement, takes subject to it, though the postponed mortgage was first filed for record. *Loewen* v. *Forsee*, 137 Mo. 29 (38 S. W. Rep. 712; 59 Am. St. Rep. 489). A recital in a mortgage that the indebtedness described thereby "being for a loan thereof, made by" the mortgagee, does not estop him from showing that the mortgage was given to secure purchase money, as against one purchasing the land on a prior judgment, who is not shown to have acquired his title in reliance upon such recital. *Bisbee* v. *Carey*, 17 Wash. 224 (49 Pac. Rep. 220). The relative rights of a vendor taking a purchase money mortgage and the holder of a prior judgment against the vendee are not affected by an agreement between such vendor and his vendee giving the latter the right to execute a mortgage for such amount, which shall have priority over the purchase money mortgage. *Peaslee* v. *Hart*, 71 Minn. 319 (73 N. W. Rep. 976). Where, after a conveyance of land to two persons and their execution of a purchase money mortgage to the grantor, on account of dissatisfaction among the grantees, in pursuance of an agreement among all the parties interested, and as a substitute for the original transaction, the grantor conveys the premises to one of the original grantees and takes his mortgage to secure the purchase price, the latter instruments are valid and the mortgage will be treated as a purchase money mortgage as against all not misled into acquiring rights on the appearance of a different state of facts. *Coleman* v. *Reynolds*, 181 Pa. St. 317 (37 Atl. Rep. 548).

Sec. 590. Priority of mortgages to secure future advances. Where the mortgage given to secure future advances has priority of record the constructive notice arising from the subsequent recording of another mortgage is not, of itself, sufficient to postpone the priority of the first mortgage

for advances thereafter made, even though such advances were optional, and not obligatory. *Anderson* v. *Liston*, 69 Minn. 82 (72 N. W. Rep. 52); *Union Nat. Bank* v. *Milburd & Stoddard Co.*, 7 N. Dak. 201 (73 N. W. Rep. 527); *Schmidt* v. *Zahrndt*, 148 Ind 447 (47 N. E. Rep. 335). The second case cited contains an elaborate review of the authorities upon the question of priority of mortgages to secure future advancements, and in the last case cited the court say: "In *Brinkmeyer* v. *Browneller*, 55 Ind. 487, this court declared the following propositions, sustained by the authorities: 'First. Where the mortgagee has bound himself to make or incur liabilities, such advances, when made, shall relate back, and the mortgage will be a valid lien for advances made or liabilities incurred against subsequent purchasers or incumbrancers with notice, actual or constructive, of the mortgage. Second. Where there is no obligation on the mortgagee, and such advances or liabilities are merely optional with him, and he has actual notice of a subsequent incumbrance or conveyance of the mortgaged premises before making advances or incurring liabilities, his lien is not good as against the subsequent purchaser or incumbrancer. See 11 Am. Law Reg. (N. S.) 273, and authorities there cited.' The authorities generally seem to sustain the first of said propositions. *Brinkmeyer* v. *Helbling*, 57 Ind. 435, 449, 450; *Crane* v. *Deming*, 7 Conn. 387; *Griffin* v. *Burtnett*, 4 Edw. Ch. 673; *Boswell* v. *Goodwin*, 31 Conn. 74 (81 Am. Dec. 169); *Rowan* v. *Manufacturing Co.*, 29 Conn. 282, 329; *Bank* v. *Cunningham*, 24 Pick. 270 (35 Am. Dec. 322) and note; and note to *Divver* v. *McLaughlin*, 2 Wend. 596 (20 Am. Dec., on page 668); 15 Am. & Eng. Enc. Law, p. 799; 1 Jones, Mortg., § 370; 3 Pom. Eq. Jur., § 1199. While there is conflict in the authorities as to the doctrine declared in the second proposition, yet the same is sustained by reason and authority. Many authorities declare that if the future advances are optional, the prior mortgage, which is duly recorded, has preference over subsequent recorded mortgages or conveyances, not only for advances previously made, but also for advances made after their recording without actual notice thereof; that recording the second incumbrance does not operate as constructive notice, but actual notice is required. *Brinkmeyer* v. *Browneller*, 55

Ind. 487; *Ward* v. *Cooke*, 17 N. J. Eq. 99, and cases cited; *Williams* v. *Gilbert*, 37 N. J. Eq. 86; *Sayre* v. *Hewes*, 32 N. J. Eq. 652; *Nelson's Heirs* v. *Boyce*, 7 J. J. Marsh. 401 (23 Am. Dec. 411); *McDaniels* v. *Colvin*, 16 Vt. 300 (42 Am. Dec. 512); *Boswell* v. *Goodwin*, 31 Conn. 74 (81 Am. Dec. 169); *Crane* v. *Deming*, 7 Conn. 387; *Rowan* v. *Manufacturing Co.*, 29 Conn. 282, 329; *Wilson* v. *Russell*, 13 Md. 494 (71 Am. Dec. 645); *Witczinski* v. *Everman*, 51 Miss. 841; *Truscott* v. *King*, 6 Barb. 346; *Craig* v. *Tappin*, 2 Sandf. Ch. 78; *Robinson* v. *Williams*, 22 N. Y. 380; *Ackerman* v. *Hunsicker*, 85 N. Y. 43 (39 Am. Rep. 621); *Reynolds* v. *Webster*, (Sup.) 24 N. Y. Supp. 1133; *Frye* v. *Bank*, 11 Ill. 367; *Tapia* v. *Demartini*, 77 Cal. 383 (19 Pac. Rep. 641, and cases cited; 11 Am. St. Rep. 288 and note); *Ripley* v. *Harris*, 3 Biss. 199 (Fed. Cas. No. 11,853); *Conard* v. *Insurance Co.*, 1 Pet. 386; *Shirras* v. *Caig*, 7 Cranch 51; note to *Divver* v. *McLaughlin*, 2 Wend 596 (20 Am. Dec., on pages 661, 662); 15 Am. & Eng. Enc. Law, pp. 800, 801; 3 Pom. Eq. Jur. 1199; 1 Jones, Mortg., §§ 364, 368–370, 372–374; 2 Am. Law Reg. (N. S.), 19 *et seq.*; 11 Am. Law Reg. (N. S). 273, and authorities cited. Chief Justice Redfield, in an article of this subject in 2 Am. Law Reg. (N. S). at page 18 said: 'The most important remaining inquiry is in regard to the extent and kind of notice of the subsequent mortgage which it is requisite the first mortgagee should have in order to postpone his further advances to such intervening security. As a general rule, it has been considered that the registry of the second mortgage will only be notice of its contents to future purchasers and incumbrancers, and not to prior incumbrancers; thus operating forward, and not backward. * * * We find the law established in some states that the registry is full notice to the first mortgagee not to make further advances under his mortgage. * * * But the general view of the American courts, and the uniform declaration of the English courts, as far as we know, is that nothing short of notice in fact will have this effect. It is expressed under various forms of language, but the result of the whole is that, if the first mortgagee have knowledge of the existence of a second mortgage upon the estate, he cannot give further credit upon his prior mortgage; provided it is entirely optional with

him whether to make further advances or not. This has often been declared by judges and text writers, and may now be regarded as settled law, notwithstanding an occasional case seems to require something more.' "

Sec. 591. Assumption of mortgage.—Liability of grantee. The liability of a vendee whose covenant assuming a mortgage debt is absolute on its face,to the holder of such debt, is determined by the terms of the contract of assumption between such vendee and his vendor, although contained in a contemporaneous agreement. *Ellett* v. *McGhee*, 94 Va. 377 (26 S. E. Rep. 874). Citing, *Crowell* v. *St. Barnabas Hospital*, 27 N. J. Eq. 655, 656; *Keller* v. *Ashford*, 133 U. S. 610, 625, 626 (10 Sup. Ct. Rep. 494); 1 Jones, Mort., § 764. A purchaser of mortgaged property cannot be subjected to the payment of a sum not embraced in the terms of the mortgage nor alleged to have been omitted therefrom by accident or mistake. *Schaeffer* v. *Schaeffer*, 182 Pa. St. 598 (38 Atl. Rep. 474). A grantee may defend against personal liability on a covenant of assumption fraudulently inserted in his deed by his grantor without his consent, *Hull* v. *Vining*, 17 Wash. 352 (49 Pac. Rep. 537); but he must disaffirm it immediately upon discovery of the fraud. *Bogart* v. *Noble*, 112 Mich. 697 (71 N. W. Rep. 320). The right of a grantee to assail a clause in his deed, by which he assumes the payment of a mortgage, on account of fraud in its insertion, may be waived by delay. *Sutter* v. *Rose*, 169 Ill. 66 (48 N. E. Rep. 411). A purchaser who assumes and agrees to pay an existing mortgage on the premises and deducts the amount thereof from the purchase price, cannot afterwards assail the validity of the mortgage. *Cummings* v. *Jackson*, 55 N. J. Eq. 805 (38 Atl. Rep. 763).

The acceptance of a deed by a grantee, containing a covenant to assume and pay an existing mortgage debt on the property, renders him personally liable therefore. *Connor* v. *Jones*, S. Dak. (72 N. W. Rep. 463); *Beeson* v. *Green*, 108 Ia. 406 (72 N. W. Rep. 555); *Haas* v. *Dudley*, 30 Or. 355 (48 Pac. Rep. 168); *Gibson* v. *Hambleton*, 52 Neb. 601 (72 N. W. Rep. 1038); *Thompson* v. *Cheesman*, 15 Utah 48 (48 Pac. Rep. 477). And in Iowa and Wisconsin this lia-

bilty is held to exist whether the grantee's immediate grantor was personally liable for the debt or not. *Marble Sav. Bank* v. *Mesarvey*, 101 Ia. 285 (70 N. W. Rep. 198); *Enos* v. *Sanger*, 96 Wis. 150 (70 N. W. Rep. 1069; 65 Am. St. Rep. 88; 37 L. R. A. 862); *Stites* v. *Thompson*, 98 Wis. 329 (73 N. W. Rep. 774). It is held that a recital in a deed, after the warranty clause, "except a mortgage of $2,600 given by P. to J. which second party assumes," makes the grantee personally liable for the mortgage debt. *Jehle* v. *Brooks*, 112 Mich. 181 (70 N. W. Rep. 440). A grantee of mortgaged premises who assumes and agrees to pay the mortgaged debt as a part of the consideration, thereby becomes personally liable for any deficiency to the mortgagee. *Flint* v. *Winter Harbor Land Co.*, 89 Me. 420 (36 Atl. Rep. 634).

In the case of *Starbird* v. *Cranston*, 24 Col. 20 (48 Pac. Rep. 652), the supreme court of Colorado say: "Mr. Pomeroy, in discussing the rationale of the grantee's liability, in his work on Equity Jurisprudence, uses the following language: 'The ground of grantee's liability adopted by the courts of a large majority of the states is that of contract. It is an application of the general doctrine, so widely prevailing in this country that it may properly be called an American doctrine. Where A. makes a promise directly to B. for the benefit of C., upon a consideration moving alone from B., C. being the party beneficially interested, may treat the promise as though made to himself, and may maintain an action at law upon it in his own name against A., the promisor. According to this generally accepted view, the liability of the grantee, who thus assumes the payment of an outstanding mortgage, does not depend upon any extension of the equitable doctrine concerning subrogation. It is strictly legal, arising out of a contract binding at law. The mortgagee, instead of enforcing the liability by a suit in equity for a foreclosure, may maintain an action at law against the grantee upon his promise, and recover a personal judgment for the whole mortgage debt.' 3 Pom. Eq. Jur., § 1207. Among the adjudicated cases announcing this rule are *Burr* v. *Beers*, 24 N. Y. 178 (70 Am. Dec. 327); *Thorp* v. *Coal Co.*, 48 N. Y., 258; *Dean* v. *Walker*, 107 Ill. 540 (47 Am. Rep. 467); *Bay* v. *Williams*, 112 Ill. 91 (54 Am. Rep. 209); *Schumucker* v.

Sibert, 18 Kan. 104 (26 Am. Rep. 765); *Urquhart* v. *Brayton*, 12 R. I. 169; *Ross* v. *Kennison*, 88 Ia. 896; *Rogers* v. *Gosnell*, 58 Mo. 589; *Merriman* v. *Moore*, 90 Pa. St. 78; *Follansbee* v. *Johnson*, 28 Minn. 311 (9 N. W. Rep. 882); *Bassett* v. *Hughes*, 48 Wis. 319; Bliss, Code Pl., § 128."

Sec. 592. Assumption of mortgage—Parol agreement to assume. A parol agreement of a grantee to assume and pay an incumbrance as a part of the consideration for which the deed is made is valid and may be enforced. But such agreement must be established by evidence that is clear and convincing and it cannot be established by inference. *Ordway* v. *Downey*, 18 Wash. 412 (51 Pac. Rep. 1047; 68 Am. St. Rep. 892). The court cite in support of the first proposition the following authorities: *Strohauer* v. *Voltz*, 42 Mich. 444 (4 N. W. Rep. 161); 2 Warv. Vend., p. 668; Wilts. Mort. Forec., p. 274, § 224; *Merriman* v. *Moore*, 90 Pa. St. 78; *McDill* v. *Gunn*, 48 Ind. 315; *Lamb* v. *Tucker*, 42 Ia. 118; *Tainor* v. *Hemmingway*, 18 Hun, 458, affirmed in 88 N. Y. 610; *Wilson* v. *King*, 28 N. J. Eq. 150; 1 Jones Mortg. (5th Ed.), § 750, p. 708; *Drury* v. *Improvement Co.*, 13 Allen 168; *Society* v. *Haines*, 47 O. St. 428 (25 N. E. Rep. 119); note to *Klapworth* v. *Dressler*, 2 Beasley Ch. 62 (78 Am. Dec. 84), and additional authorities there cited. In Missouri it is held that parol evidence is admissible to establish an agreement of assumption by a vendee for the purpose of placing the vendor in the attitude of a surety as to the assumed debt, without proof that the holder of the debt had notice of such agreement. *Nelson* v. *Brown*, 140 Mo. 580 (41 S. W. Rep. 960; 62 Am. St. Rep. 755).

Sec. 593. Assumption of entire mortgage debt by grantee of part of mortgaged land. When a mortgagor grants the mortgaged premises in separate parcels, and at different times, he may, as between himself and his grantees (though not as against the mortgagee), burden one tract with the entire debt, and release the remainder; and when he deeds one parcel to a grantee, who assumes and agrees to pay the entire mortgage debt, and subsequently, by warranty deed, conveys the balance of the land, as between these three persons and the subsequent grantees with notice, the tract first

conveyed is, in equity, the primary fund, which must be exhausted before the other tract subsequently conveyed can be applied to the payment of the debt, although a subsequent grantee of the portion first conveyed agrees only to pay a proportionate part of the debt. *Skinner* v. *Harker*, 23 Colo. 333 (48 Pac. Rep. 648). Where a vendee of a part of mortgaged premises fails to perform his covenant to pay the entire mortgage debt and save his vendor harmless therefrom, the latter may recover from him the value of the property retained which was sold upon foreclosure sale with the portions conveyed to satisfy the mortgage debt. *Haas* v. *Dudley*, 30 Or. 355 (48 Pac. Rep. 168).

Sec. 594. Surety relation of mortgagor—Extensions. Where a grantee of the mortgagor assumes the mortgage debt, as between them and all persons claiming under the grantee, the land becomes the primary fund for the payment of the debt. *Harrison* v. *Masterson*, 91 Tex. 171 (41 S. W. Rep. 482). Where a mortgagor's grantee agrees to pay the mortgage, as between themselves the latter is principal and the former is surety, but the holder of the mortgage may treat both as principals. *Thompson* v. *Cheesman*, 15 Utah 48 (48 Pac. Rep. 477). See opinion for collation of authorities. In Utah it is held that a purchaser who assumes the payment of an existing mortgage thereby becomes the principal debtor and the mortgagor is surety of the debt merely, and an extension of the time of payment of the mortgage by an agreement between the holder of it and the purchaser without the consent of the mortgagor, discharges the mortgagor from liability under it. *Schroeder* v. *Kinney*, 15 Utah 462 (49 Pac. Rep. 894). The same is held in Missouri. *Nelson* v. *Brown*, 140 Mo. 580 (41 S. W. Rep. 960; 62 Am. St. Rep. 755). Citing, *Home Nat. Bank* v. *Estate of Waterman*, 134 Ill. 461 (29 N. E. Rep. 508); *Insurance Co.* v. *Hanford*, 27 Fed. Rep. 588; *Spencer* v. *Spencer*, 95 N. Y. 353; *George* v. *Andrews*, 60 Md. 26 (45 Am. Rep. 706); *Calvo* v. *Davies*, 78 N. Y. 211 (29 Am. Rep. 130); *Fish* v. *Hayward*, 28 Hun 456; *Murray* v. *Marshall*, 94 N. Y. 611; *Insurance Co.* v. *Hanford*, 143 U. S. 187 (12 Sup. Ct. Rep. 437); *Metz* v. *Todd*, 35 Mich. 473; *Remsen* v. *Beekman*, 25 N. Y. 552;

Hurd v. *Callahan*, 9 Abb. N. C. 374; *Jester* v. *Sterling*, 25 Hun 577: *King* v. *Baldwin*, 2 Johns. Ch. 559.

Sec. 595. Assumption of mortgage—Who may maintain action on grantee's covenant, and when. One to whom a mortgage debt is payable may maintain an action in his own name against a grantee assuming and agreeing to pay such debt, *Morgan* v. *South Milwaukee Lake View Co.*, 97 Wis. 275 (72 N. W. Rep. 872); and so may his assignee. *Starbird* v. *Cranston*, 24 Colo. 20 (48 Pac. Rep. 652). In Virginia it is held that an action for personal judgment in such a case may be brought in a jurisdiction where the parties may be found although it be different from that in which the mortgaged land is located. *Tatum* v. *Ballard*, 94 Va. 370 (26 S. E. Rep. 871). After a mortgagee has notice and assents to a covenant of a grantee assuming his mortgage, his right of action on such covenant cannot be divested by a voluntary rescision thereof by the contracting parties. *Gibson* v. *Hambleton*, 52 Neb. 601 (72 N. W. Rep. 1033); *Starbird* v. *Cranston*, 24 Colo. 20 (48 Pac. Rep. 652). In Iowa it is held that an action may be maintained against such a grantee on his covenant, without first foreclosing the mortgage. *Beeson* v. *Green*, 108 Ia. 406 (72 N. W. Rep. 555). Citing, *Burr* v. *Beers*, 24 N. Y. 178 (80 Am. Dec. 327): *Follansbe* v. *Menage*, 28 Minn. 311 (9 N. W. Rep. 882); *Campbell* v. *Smith* 71 N. Y. 26 (27 Am. Rep. 5). Where a grantee of real estate, as a part of the consideration for the purchase, assumes and agrees in the deed to pay a certain mortgage on the premises, he is liable for the mortgage debt, and the grantor immediately upon the maturity of the mortgage, the grantee having failed to pay the same, may recover from the grantee the amount due thereon, although the grantor may have paid no part of it. *Baldwin* v. *Emory*, 89 Me. 496 (36 Atl. Rep. 994), overruling *Burbank* v. *Gould*, 15, Mo. 118; *Kreling* v. *Kreling*, 118 Cal. 418 (50 Pac. Rep. 546); *Stichter* v. *Cox*, 52 Neb. 532 (72 N. W. Rep. 848). Citing, *Stout* v. *Folger*, 34 Ia. 71 (11 Am. Rep. 138); *Rubens* v. *Prindle*, 44 Barb. 336; *Wilson* v. *Stilwell*, 9 O. St. 467; *Rawson's Adm'x* v. *Copland*, 2 Sandf. ch. 278; *Furnas* v. *Durgin*, 119 Mass. 500 (20 Am. Rep. 341); *Locke* v. *Homer*,

131 Mass. 98 (41 Am. Rep. 199); *Farnsworth* v. *Boardman*, 131 Mass. 115; *Reed* v. *Paul*, 131 Mass. 129; *Gage* v. *Lewis*, 68 Ill. 604; *Churchill* v. *Hunt*, 3 Denio, 321; *Thomas* v. *Allen*, 1 Hill 145; *Jones* v. *Parks*, 78 Ind. 537.

Sec. 596. Assignment of mortgage—What constitutes. A transfer of the mortgage debt carries the mortgage with it. *Franke* v. *Neisler*, 97 Wis. 364 (72 N. W. Rep. 887); *Mutual Benefit Life Ins. Co.* v. *Huntington*, 57 Kan. 744 (48 Pac. Rep. 19); *Perkins* v. *Gumbel*, 49 La. 653 (21 So. Rep. 743). Applying La. Rev. Civ. Code, art. 2615. An equitable assignment of a negotiable promissory note secured by a mortgage may be made by a sale and delivery thereof by the person to whose order the note is payable, without an endorsement of the note or a formal assignment in writing of the mortgage or note; and such purchaser may maintain an action in his own name to foreclose said mortgage. *Greely State Bank* v. *Line*, 50 Neb. 434 (69 N. W. Rep. 966). Citing, *Nelson* v. *Ferris*, 30 Mich. 497; *Haescig* v. *Brown*, 34 Mich. 502; *Baker* v. *Armstrong*, 57 Ind. 189; *Andrews* v. *Powers*, 35 Wis. 644; *Kamena* v. *Huelbig*, 23 N. J. Eq. 78; *Strause* v. *Josephthal*, 77 N. Y. 622; *Younker* v. *Martin*, 18 Ia. 143; *Crain* v. *Paine*, 4 Cush. 483 (50 Am. Dec. 807). A transfer by the delivery of a bond and mortgage belonging to his estate, made by an executor to his successor, under an order of court, will operate as an assignment. *Daly* v. *New York & G. L. Ry. Co.*, 55 N. J. Eq. 595 (38 Atl. Rep. 202). A full and formal assignment in writing of a bond and mortgage given to secure it executed under the seal of the holder for a valuable consideration then paid which is delivered to the assignee is effectual to pass to him title to the bond and mortgage by way of pledge without actual delivery of the latter. *Mott* v. *German Hospital*, 55 N. J. Eq. 722 (37 Atl. Rep. 757). For the purpose of preserving a mortgagor's right to redeem, a conveyance of the mortgage by the mortgagee to a purchaser of the equity of redemption at an execution sale will be held an assignment, and not an extinguishment of the mortgage. *Felker* v. *Mowry*, N. H. (38 Atl. Rep. 726). A deed by a mortgagee who has purchased the premises at a void foreclosure sale, which purports to convey only

the legal title to the land, has the effect of an assignment of the mortgage. *Smithson Land Co.* v. *Brautigam*, 16 Wash. 174 (47 Pac. Rep. 434).

In Arkansas, where a mortgage is simply a right to hold the land as security for the payment of the mortgage debt, it is held that one to whom a decree foreclosing a mortgage had been granted, could only convey her interest in such decree by its assignment, and that it did not pass by her executing a mortgage on the land, although at the time she was the owner of a dower interest therein. Bunn, C. J., and Riddick, J., dissenting. *Polk* v. *Simon*, 63 Ark. 569 (39 S. W. Rep. 1045). Citing, *Purdy* v. *Huntington*, 43 N. Y. 334 (1 Am. Rep. 532); *Swan* v. *Yaple*, 35 Ia. 248. Where a second mortgagee obtained a judgment and decree of foreclosure, which was void on account of want of due service of the summons, assigned as collateral security to an intervening party this judgment and decree, and all right, title and interest which he had therein, and in and to the debts therein described, and in and to the mortgaged premises which might be acquired by said decree, and in and to the proceedings of any sale thereunder, it is held that, notwithstanding the invalidity of the judgment of foreclosure, the assignment operated as an assignment of the mortgage and the debt secured thereby, and of the rents and profits to which the assignor was entitled, as a mortgagee in possession. *Anderson* v. *Minnesota Loan & T. Co.*, 68 Minn. 491 (71 N. W. Rep. 665). Where a third party, at the request of one of the defendants in a decree of foreclosure, paid to the holder thereof a large proportion of the amount of the decree, and another defendant paid the necessary balance, and took from the mortgagee an assignment of the mortgage and decree, there being no agreement as to when his money should be repaid, or extending time of sale, or limiting his rights, it is held that the transaction did not amount to the making of a new mortgage, so as to require a new decree before sale, and that such person had all the rights of the holder of such decree. *Walker* v. *Lillibridge*, 112 Mich. 334 (70 N. W. Rep. 1031).

Sec. 597. Assignment of mortgage—Title and rights of assignee. One who takes an assignment of a mortgage in

consideration of past indebtedness, takes subject to all the equities existing between the original parties; and where the assignment recites that it is "in consideration of advances made by" the assignee, in the absence of evidence to the contrary, it will be presumed that the advancements were made before the assignment. *Egan* v. *Raysor*, 49 S. C. 469 (27 S. E. Rep. 475). A mortgage has none of the privileges of negotiable paper, but it is a mere chose in action which an assignee takes subject to any defense existing between the original parties, unless they are estopped by their acts or otherwise from asserting it as against the assignee; but he does not take it subject to any equities of third parties of which he has no notice. *Moffet* v. *Parker*, 71 Minn. 189 (73 N. W. Rep. 850). To the same effect is the case of *Equitable Sec. Co.* v. *Talbert*, 49 La. 1393 (22 So. Rep. 762). In Missouri it is held that a purchaser in good faith, for value, before maturity, of a negotiable promissory note secured by mortgage upon real estate, takes the security which passes as incident to the note, free from the equities existing between the original parties. *First Nat. Bank* v. *Rohrer*, 138 Mo. 369 (39 S. W. Rep. 1047); *Crawford* v. *C. Aultman & Co.*, 139 Mo. 262 (40 S. W. Rep. 952). Mere assignment of a note secured by a mortgage containing a power of sale does not transfer to the assignee the power of sale, and a sale by him under the power amounts merely to an equitable assignment of the note and mortgage. *Hussey* v. *Hill*, 120 N. C. 312 (26 S. E. Rep. 919; 58 Am. St. Rep. 789). One holding under an assignment of a mortgage absolute on its face, may maintain in his own name an action to foreclose it, although he is bound by an independent agreement to account for the proceeds to another. *Ingham* v. *Weed*, Cal. (48 Pac. Rep. 818). One taking an assignment of a mortgage with full knowledge of the transaction concerning the loan to secure which it was given, is estopped to claim that the mortgage was void because given in an *ultra vires* transaction. *Woodcock* v. *First Nat. Bank*, 118 Mich. 286 (71 N. W. Rep. 477).

Sec. 598. Recording assignment of mortgage. The rights of an assignee of a mortgage holding under an unrecorded assignment of it, are postponed to the rights of a sub-

sequent *bona fide* purchaser of the mortgaged property without notice of the assignment and in reliance upon a satisfaction duly entered of record by the original mortgagee. *Porter* v. *Ourada*, 51 Neb. 510 (71 N. W. Rep. 52). An assignment of a mortgage is a conveyance within the meaning of Mass. Pub. Stat., ch. 120, § 4, and must be recorded in order to prevail over a subsequent purchaser or mortgagee without notice. *Swasey* v. *Emerson*, 168 Mass. 118 (46 N. E. Rep. 426; 60 Am. St. Rep. 368). One claiming under an unrecorded assignment of a mortgage cannot prevail against one holding notes secured by a subsequent mortgage taken in reliance upon a subsequent recorded release of the first mortgage, executed and recorded by the mortgagee. *Commonwealth* v. *Globe Inv. Co.*, 168 Mass. 80 (46 N. E. Rep. 410). In New York it is not necessary to record an assignment of a recorded mortgage as against a subsequent purchaser of the mortgaged premises, but only against the subsequent purchaser of the mortgage itself. *Curtis* v. *Moore*, 152 N. Y. 159 (46 N. E. Rep. 168). Under N. J. Rev., p. 708, § 82, the recording of an assignment of a mortgage is notice, from the time the assignment is left for record, to all persons concerned, that the mortgage is assigned. A subsequent assignee of the mortgagee is a "person concerned," within the meaning of this statute, and must be held to have had constructive notice of the previous assignment, from the date when it was deposited for record. *Mott* v. *Germau Hospital*, 55 N. J, Eq. 722 (37 Atl. Rep. 757). In Indiana the assignment of a mortgage must be made "in writing either upon the margin of the record where such mortgage is recorded or by written instrument" which must be recorded by the assignee under penalty of a loss of ten per cent of the mortgage indebtedness. Laws 1899, p. 191. Kansas has a statute requiring the recording of assignments of real estate mortgages, Laws 1899, p. 340, repealing Sess. Laws 1897, ch. 160. Certain defective assignments of mortgages and their records are legalized by Kan. Laws 1899, p. 319. Under Utah Comp. Laws 1888, §§ 2613, 2645, an assignment of a mortgage must be recorded in order to give notice to subsequent grantees, mortgagees and lien holders. *Donaldson* v. *Grant*, 15 Utah 231 (49 Pac. Rep. 779).

Sec. 599. Assignment of mortgages—Payment to mortgagee afterward. A payment by a purchaser of part of the mortgaged premises to a mortgagee who has previously assigned both notes and mortgage, is not good as against his assignee when made without his knowledge or consent, after he had recorded his assignment and had possession of the notes. *Woodward* v. *Brown*, 119 Cal. 288 (51 Pac. Rep. 2; 68 Am. St. Rep. 108). A mortgagor without notice of an unrecorded assignment of the mortgage by the mortgagee may defend against an action of foreclosure by the assignee by showing subsequent payment to the mortgagee. *McAuliffe* v. *Reuter*, 166 Ill. 491 (46 N. E. Rep. 1087); *Beuhler* v. *McCormick*, 169 Ill. 269 (48 N. E. Rep. 287). Minn. Gen. Stat. 1894, § 4188, providing that the assignment of a mortgage is not constructive notice to the mortgagor, his heirs and personal representatives, so as to invalidate any payment made by either of them to the mortgagee, applies only to the persons therein named, and has no application to a second mortgagee, or an assignee of his mortgage. As between an assignee of a first mortgage, whose assignment was duly recorded before the making of a second mortgage, and the assignee of such second mortgage, the latter is not entitled to have the first mortgage cancelled on the ground that, after the assignment of the first mortgage, it was paid to the mortgagee without actual notice of the assignment. *Robbins* v. *Larson*, 69 Minn. 486 (72 N. W. Rep. 456; 65 Am. St. Rep. 572). Where a second mortgagee for money loaned, who agrees with the mortgagor to pay the money in discharge of the first mortgage, securing a negotiable note, pays it to the original mortgagee after he has assigned the mortgage, he does so at his peril. *Porter* v. *Ourada*, 51 Neb. 510 (71 N. W. Rep. 52); *Herbage* v. *Moodie*, 51 Neb. 887 (71 N. W. Rep. 778)

Sec. 600. What constitutes payment—Presumptions. Actual production of the money is not necessary to constitute a sufficient tender of payment to a mortgagee where he refuses to accept it, knowing that the debtor has the money at hand. *Smith* v. *Old Dominion Bldg. & L. Ass'n*, 119 N. C. 257 (26 S. E. Rep. 40). An equitable assignment of a mortgage to the mortgagor operates to discharge it. *Hussey*

v. *Hill*, 120 N. C. 812 (26 S. E. Rep. 919; 58 Am. St. Rep. 789). An assignment of a mortgage, taken in his individual capacity, without authority from a probate court, by an executor of a grantee who has assumed its payment, does not operate as a payment so as to extinguish the mortgage and let in a judgment creditor of an intermediate grantee. *Keet* v. *Baker*, 141 Mo. 175 (42 S. W. Rep. 940). Where persons who are obligated only to pay a portion of a mortgage debt, after the payment of such portion pay the balance due, such payment does not extinguish the mortgage as to such balance. *Ingham* v. *Weed*, Cal. (48 Pac. Rep. 818). Where property is sold upon a mortgage foreclosure and bid in by the parties interested for the amount of the debt, it will operate as a payment of the mortgage although no deed was ever made in pursuance of the sale. *Brown* v. *Tucker*, Tenn. (39 S. W. Rep. 846). Where a widow having a dower interest in land mortgaged by her husband, pays the amount of the mortgage debt to the mortgagee, who delivers the mortgage to her, under an agreement that if her rights in the estate are litigated she will redeliver the mortgage to him, and he the money to her, which return of the mortgage and money is subsequently made on account of the existence of the condition, the transaction does not amount to a payment of the mortgage debt. *Becker* v. *Carey*, N. J. Eq. (36 Atl. Rep. 770). Where, at the time of the execution of a mortgage for $2,200, it was agreed that the mortgagor was to pay one-half of that sum for the land, to finish a building thereon, and pay the cost of the material for it, which the mortgagee was to furnish, and it was stipulated that the cost of the estate and of the material "whether more or less than said $2,200 shall be received in payment of such note and in discharge of said mortgage," it is held that a payment of $2,200 would discharge the mortgage, though a greater sum was due under the agreement. *Ford* v. *Davis*, 168 Mass. 116 (46 N. E. Rep. 435). A lapse of twenty years without demand or acknowledgment of the mortgage debt, raises a conclusive presumption of its payment. *Blue* v. *Everett*, 55 N. J. Eq. 329 (36 Atl. Rep. 960); *Staples* v. *Staples*, 20 R. I. 264 (38 Atl. Rep. 498). In order to rebut a presumption of payment arising from lapse of time, by an endorsement on the obligation, it must be shown to

be genuine and to have been made before the presumption of payment had ripened. *Hart* v. *Bucher*, 182 Pa. St. 604 (38 Atl. Rep. 472). Particular evidence examined and held to show that there was no payment of principal or interest on a mortgage debt for 20 years. *Blue* v. *Everett*, 55 N. J. Eq. 329 (36 Atl. Rep. 960). Applying N. C. Code, § 1271, it is held that it is competent to interpose as evidence of payment of a mortgage indebtedness, the entry of "satisfaction" on the margin of the record signed by the mortgagee and witnessed by the register of deeds. *Robinson* v. *Sampson*, 121 N. C. 99 (28 S. E. Rep. 189). Particular evidence held insufficient to show payment of a mortgage indebtedness. *Johnson* v. *Johnson*, 101 Ia. 405 (70 N. W. Rep. 598). Particular evidence held insufficient to show a gift of a mortgage to the mortgagor by the mortgagee. *In re Schiehl's Estate*, 179 Pa. St. 308 (36 Atl. Rep. 181). The presumption of an intention to extinguish the mortgage which arises when the owner of the mortgaged premises pays it off, is not overcome by his purchasing the mortgage and taking a transfer of it to himself, where there is nothing to show that it would be to his interest to keep the mortgage alive. *Bradford* v. *Burgess*, 20 R. I. 290 (38 Atl. Rep. 975).

Sec. 601. Payment of mortgage debt to clerk of court after commencement of foreclosure proceedings. Where, after the commencement of an action to foreclose a real estate mortgage for the entire debt, but before judgment, the mortgagors, in vacation, without an order of court or plea, deposited with the clerk of the court the full amount of the mortgage debt and all costs, which money was embezzled by the clerk who afterwards absconded, it was held that he did not receive the money by virtue of his office, but in his individual capacity, as a mere agent of the mortgagors, and that such deposit of the money did not extinguish the mortgage. Irvine and Ragan, CC., dissenting. *Commercial Investment Co.* v. *Peck*, 53 Neb. 204 (73 N. W. Rep. 452). The court say: "The legislature of this state has provided (Code of Civil Procedure, § 889) 'the clerk of each of the courts shall exercise the powers and perform the duties conferred and imposed upon him by other provisions of this Code, by other statutes,

and by the common law. In the performance of his duties he shall be under the direction of his court.' The clerk of the district court of Dawes county did not receive the money under and by virtue of any order of the court below, requiring the payment to be made, for the very obvious reason no such order was ever entered. Moreover, the money was not received by the clerk during term time, or under such circumstances as to admit of an inference that the payment was made under the court's direction; but the clerk received the money in vacation, and without the sanction of the court, either expressed or implied. At common law, payment to the clerk in vacation during the pendency of an action, before judgment and without an order of court, of the amount due plaintiff, was not authorized, and no statutory enactment in this state can be found which empowers a clerk of the district court to receive money under the circumstances disclosed by this record. The law did not constitute the clerk as the agent of this plaintiff to receive the amount of its mortgage. After judgment, a clerk of court may receive payment, even in the absence of any express statute upon the subject. *McDonald* v. *Atkins*, 18 Neb. 568 (14 N. W. Rep. 532); *Moore* v. *Boyer*, 52 Neb. 446 (72 N. W. Rep. 586). The authority of a clerk of a court to receive payment of a judgment in his office existed at common law, and has been recognized by long usage. The official power of the clerk is circumscribed by the extent of his duties, and he ceases to act by virtue of his office whenever he steps beyond the boundary of his power. It was no part of the official duty of the clerk to receive the money from these mortgagors. He did not act officially, but in his individual capacity as the mere agent of those who intrusted him with the money. *Durant* v. *Gabby*, 2 Metc. (Ky.) 91; *Baker* v. *Hunt*, 1 Wend. (N. Y.) 108; *Currie* v. *Thomas*, 8 Port. (Ala.) 293; *Windham* v. *Coats*, 8 Ala. 285; *Ball* v. *Bank*, 8 Ala. 590 (42 Am. Dec. 649); *Governor* v. *Read*, 38 Ala. 258; *Alexandrie* v. *Saloy*, 14 La. Ann. 326; *Hammer* v. *Kaufman*, 39 Ill. 87."

Sec. 602. Authority to receive payment—Agents. A provision in a mortgage that if the mortgagor shall pay the mortgagee, "his heirs, assigns or legal representatives, the principal sum," etc., "then this mortgage shall be null and

void," does not constitute the mortgagee the agent of the endorsee of the note secured, to receive payment after such endorsement. *Herbage* v. *Moodie*, 51 Neb. 887 (71 N. W. Rep. 778). The mere fact that a mortgagee has been in the habit of collecting interest from the mortgagor and remitting it to an assignee of the mortgage is not alone sufficient to authorize the conclusion that the mortgagee's agency was such as to authorize him to collect the entire unmatured mortgage debt. *Porter* v. *Ourada*, 51 Neb. 510 (71 N. W. Rep. 52); *Herbage* v. *Moodie*, 51 Neb. 887 (71 N. W. Rep. 778). Where a mortgagee, retaining in his own possession the mortgage papers, forwards from time to time the coupon interest notes to a third party for collection, it does not authorize the payment by the mortgagor or his grantee of the premises of the principal sum to such person as agent of the mortgagee, he not having the note and mortgage in his possession. *Trull* v. *Hammond*, 71 Minn. 172 (73 N. W. Rep. 642). Particular evidence held sufficient to show one's authority to receive payment as agent of the mortgagee. *Thornton* v. *Lawther*, 169 Ill. 228 (48 N. E. Rep. 412); *Kimball* v. *Zimmerman*, 51 Neb. 861 (71 N. W. Rep. 736). Particular evidence held insufficient to show one's authority to receive payment of a mortgage debt, as agent. *City Missionary Soc.* v. *Reams*, 51 Neb. 225 (70 N. W. Rep. 972); *Terry* v. *Durand Land Co.*, 112 Mich. 665 (71 N. W. Rep. 525); *Herbage* v. *Moodie*, 51 Neb. 887 (71 N. W. Rep. 778); *Frey* v. *Curtis*, 52 Neb. 406 (72 N. W. Rep. 478); *Church Ass'n of Mich.* v. *Walton*, 114 Mich. 677 (72 N. W. Rep. 998); *Trull* v. *Hammond*, 71 Minn. 172 (73 N. W. Rep. 642); *Herrick* v. *Mosher*, 71 Minn. 270 (73 N. W. Rep. 964).

Sec. 603. Payment to agent—Authority to receive things other than money. Where a loan company, authorized as an agent of the mortgagee, to receive payment of the mortgage, negotiated a new loan to the debtor, by which it took his note and mortgage for a larger sum than the original mortgage debt, due in five years, paying him the difference in money, and crediting the mortgagee's account with the balance, and before settlement with such mortgagee passed into insolvency, it is held that the transaction did not amount to a payment of the original

mortgage debt. *Moore* v. *Pollock*, 50 Neb. 900 (70 N.W. Rep. 541). The court say; "It may, we think, be fairly assumed from the foregoing statement, that the relation between the plaintiff and the Nebraska Company was that of principal and agent with respect to the interest coupons. It may also be conceded for the purpose of the present inquiry, that said company was, when the principal debt matured, authorized to receive payment thereof in behalf of the plaintiff in the usual course of business, even in the absence of the evidence of such indebtedness. But does it follow therefrom that said company could bind the plaintiff by accepting, in satisfaction of the said claim, a note and mortgage payable to its own order five years thereafter, and which would require the advancement by him or his *cestui que trust* of 50 per cent. of the face value of his security? To that question the books furnish a ready answer, in the proposition that an agent employed to make collection of commercial paper is not, as the result of such relation alone, authorized to receive in payment thereof anything but money, which, however, as said in *State* v. *Hill*, 47 Neb. 456 (66 N. W. Rep. 541), includes not only legal tender, coin, and currency, but any other circulating medium, instruments, or tokens in general use in the commercial world as the representative of value. A reference in this connection to a few of the many cases in point will serve to illustrate the foregoing proposition. *Scott* v. *Gilkey*, 153 Ill. 168 (39 N. E. Rep. 265), was a case in which a bank holding notes for collection accepted therefor other notes of the maker, payable to its own order at a future date, and surrendered the first-mentioned notes, marked "Paid." At the same time it credited the payee's account with the amount of his notes, although no money passed in the transaction. It was held not to amount to a payment, and the payee was permitted to recover. In the recent English case of *Hine* v. *Insurance Syndicate*, 11 Reports 777, it was held that an agent authorized to demand payment on behalf of his principal can receive money only, and payment by means of a bill of exchange drawn by the agent, and accepted by a debtor of the principal, payable three months after date, was held not within the authority of the former, and not binding upon the principal, although said bill was immediately discounted and honored at maturity. *Ward*

v. *Smith*, 7 Wall. 447, was a case in which a bank holding for collection certain securities, payable at its office, accepted, in satisfaction thereof, depreciated bank notes; but the court, referring to the foregoing facts when relied upon as a defense to an action on such securities, said: 'That the power of a collecting agent by the general law is limited to the receiving, for the debt of his principal, that which the law declares to be a legal tender, or which is by common consent considered and treated as money, and passes as such at par, is established by all the authorities.' See also, *Bank* v. *Goodman*, 109 Pa. St. 422 (2 Atl. Rep. 687; 58 Am. Rep. 728); *Lockenmeyer* v. *Fogarty*, 112 Ill. 572; *Graydon* v. *Patterson*, 18 Ia. 256 (81 Am. Dec. 432); *Aultman* v. *Lee*, 43 Ia. 404; *Scully* v. *Dodge*, 40 Kan. 395 (19 Pac. Rep. 807); *Robinson* v. *Anderson*, 106 Ind. 152 (6 N. E. Rep. 12); Mechem, Ag., § 875, and cases cited."

Sec. 604. Release of mortgage. Although a statute (Cal. Civ. Code, § 2938) does not specially provide for the partial release of a mortgage, such a release may be made in the same manner as a release in full. *Woodward* v. *Brown*, 119 Cal. 283 (51 Pac. Rep. 2; 63 Am. St. Rep. 108). See opinion for particular partial release held sufficient. Under Kan. Gen. Stat. 1889, par. 3889, an assignee of a duly recorded mortgage is authorized to discharge the same by an entry on the margin of the record acknowledging satisfaction of the mortgage, signed by himself in the presence of the register of deeds or his deputy who shall subscribe the same as a witness. *Mutual Benefit Life Ins. Co.* v. *Huntington*, 57 Kan. 744 (48 Pac. Rep. 19). A quitclaim deed of a portion of the mortgaged premises executed by a mortgagee to his mortgagor's conditional vendee of such portion for the purpose of effecting a release of the mortgage as to such vendee and which does not purport to be to him and his assigns, does not release the lien of the mortgage as to the mortgagor, where the title reverts to him on account of his vendee not complying with the conditions of his purchase, nor as to one purchasing the property of the mortgagor after such reversion. *Emert* v. *Williams*, Tenn. (42 S. W. Rep. 491). As bearing upon this subject the court cites, *Wyman* v. *Hooper*, 2 Gray

141; *Grover* v. *Thatcher*, 4 Gray 526; *Pierce* v. *Kneeland*, 16 Wis. 672 (84 Am. Dec. 726-728). Mass. Stat. 1882, ch. 237, construed and applied—petition for release of mortgage not recognized for twenty years. *Brintnall* v. *Graves*, 168 Mass. 384 (47 N. E. Rep. 119). For construction of particular release of mortgage, see *Wood* v. *Brown*, 104 Ia. 124 (73 N. W. Rep. 608).

Sec. 605. Release of portions of mortgaged premises upon partial payments. A covenant in a mortgage to release a certain amount of the premises upon payment of a specified sum at any one time, runs with the land, and the benefit of such a covenant may be claimed on account of a payment made after proceedings to foreclose the mortgage have been commenced. *Gammel* v. *Goode*, 103 Ia. 301 (72 N. W. Rep. 531). Where a portion of land embraced in a purchase money mortgage is released from the operation of the mortgage by the mortgagee in accordance with a stipulation contained in the mortgage, upon part payment being made, such portion is released from all liability for the purchase price. *Neale* v. *Dempster*, 179 Pa. St. 569 (36 Atl. Rep. 338). A clause in a mortgage that a mortgagee shall, "from time to time, and as often as request was made to her or them for that purpose, release from the lien and operation of the said accompanying indenture of mortgage, for each ninety dollars of principal paid, a lot of land to be selected by the said party obligor, its successors and assigns, containing two thousand square feet of land," does not oblige the mortgagee to accept a payment of less than $90.00 or to release a fractional part of two thousand square feet, or to release lots of an area less or more than two thousand square feet each, at a rate of $90.00 each. *Hall* v. *Home Bldg. Co.*, N. J. Eq. (37 Atl. Rep. 1019).

Sec. 606. Release of portion of several lots—Rights and liabilities of mortgagee. Where several lots embraced in a mortgage are conveyed to different purchasers, the mortgagee cannot release from his mortgage a portion of the lots in such a manner as to charge against the others more than their appropriate share of the mortgage indebtedness;

and where he afterwards takes a conveyance of part of the lots he will be charged with their market value although that exceeds their ratable contributive share of the indebtedness existing at the time he took his conveyance. *Brooks* v. *Benham*, 70 Conn. 92 (38 Atl. Rep. 908; 66 Am. St. Rep. 87). The court say: "He who takes a mortgage of several parcels of land, which together are worth more than the amount of his debt, and are subsequently sold by the owner of the equity of redemption, at the same time, to different persons, owes a certain duty to each of these. He ought not to release his security as to any parcel in such a manner as to increase the burden on the rest. He has no right without the consent of all, to bargain with any of these purchasers for the release of his parcel on payment of less than its fair share of the whole debt. While the whole of the debt is secured by the whole of the land, each parcel of the land, as between the different proprietors, is equitably subject only to so much of the debt as corresponds to the proportion between its value and the value of all the land; and, if its owner should be compelled to redeem the mortgage, he can resort to the others for a ratable contribution, and for that purpose is entitled to the benefit of subrogation to the mortgage title. To release any particular parcel from the mortgage incumbrance is to make, as respects that, any such subrogation impossible. The mortgagee therefore releases at his peril, if he had notice of the conveyances out of which the equities in question arise; and, if he does so without receiving from the releasee his proper contributory share of the debt, he is still equitably chargeable with the receipt of that share, in favor of the owners of the remaining parcels. *Stevens* v. *Cooper*, 1 Johns. Ch. 425 (7 Am. Dec. 499)."

Sec. 607. Release by mistake or without authority. A prior mortgagee, who was induced by the representations of the agent of a subsequent mortgagee to accept a quitclaim deed from the mortgagor and enter satisfaction of his mortgage without examining the records, is entitled to have his mortgage reinstated, as against such second mortgagee. *Nommenson* v. *Angle*, 17 Wash. 394 (49 Pac. Rep. 484). A release of a mortgage made and entered of record by mistake,

where the debt was not in fact paid, and where there was no purpose to release the mortgaged premises from the lien of the mortgage debt, may be set aside in equity, and the mortgage will be enforced as a security for the payment of the mortgage debt. A release of the mortgage so made is only *prima facie* evidence of its discharge, and the party asking relief may show that it was made by fraud, accident or mistake. *Southern Kansas Farm L. & T. Co.* v. *Garrity*, 57 Kan. 805 (48 Pac. Rep. 88). A mortgagee, who has assigned his mortgage, has no power to release or discharge it, and a release subsequently made by him will not affect the rights of the assignee. *Mutual Benefit Life Ins. Co.* v. *Huntington*, 57 Kan. 744 (48 Pac. Rep. 19). An entry of satisfaction made without authority by the holder of a trust deed after he has assigned the secured obligation, before maturity, to an innocent purchaser, will have the effect to give priority of lien to one who subsequently takes a trust deed on the premises to secure a *bona fide* loan, relying upon such entry of satisfaction; but the rule is otherwise where the second deed is made to secure advances made before such entry of satisfaction. *Evans* v. *Roanoke Sav. Bank*, 95 Va. 294 (28 S. E. Rep. 828). And such a release will not protect an innocent purchaser of the premises who inadvertently relied thereon. *Demuth* v. *Old Town Bank*, 85 Md. 315 (37 Atl. Rep. 266; 60 Am. St. Rep. 322). Where a mortgagor, who had become administrator of his mortgagee's estate, released a part of the land embraced in his mortgage without payment of his debt, a subsequent mortgagee of the released land having knowledge of all the facts, cannot assert a prior right against the estate. *Eastham* v. *Landon*, 17 Wash. 48 (48 Pac. Rep. 739). Particular case in which a junior mortgagee is charged with notice of his agent's unauthorized satisfaction of a prior mortgage after he had assigned it to another. *Parker* v. *Randolph*, 10 S. Dak. 402 (73 N. W. Rep. 906). The fraudulent release of a mortgage by the mortgagee after the indorsement, without recourse, of the bond and coupons thereby secured, in favor of a third party having notice of the rights of the holder, does not of itself render the former liable in an action *ex contractu* for the amount of such debt. *Smith* v. *Long*, 50 Neb. 749 (70 N. W. Rep. 401). See

Evans v. *Roanoke Sav. Bank*, 95 Va. 294 (28 S. E. Rep. 828). Where a trustee in a trust deed, given to secure a debt, who has authority to enter satisfaction upon the debt being paid, enters of record a satisfaction of the deed after the debt has matured but before its payment, such an entry of satisfaction will protect a subsequent *bona fide* purchaser of the property relying upon it. *Day* v. *Brenton*, 102 Ia. 482 (71 N. W. Rep. 588; 68 Am. St. Rep. 460). Particular evidence held sufficient to show that the president of a corporation had authority to execute discharges of mortgages made to it. *Swasey* v. *Emerson*, 168 Mass. 118 (46 N. E. Rep. 426; 60 Am. St. Rep. 368); *Smith* v. *Wells Mfg. Co.*, 148 Ind. 388 (46 N. E. Rep. 1000).

Sec. 608. Forged satisfaction of mortgage—Title of purchaser relying on. The rights of a mortgagee, who merely handed the mortgage to the mortgagor at his request, and for the purpose of inspection only, are in no way affected by the latter's secretly and fraudulently substituting in its place a copy thereof, abstracting the original, and forging upon it an entry of satisfaction, by means of which he procured the record of the mortgage to be cancelled; it not appearing that the mortgagee, other than as above stated, reposed any trust or confidence in the mortgagor, or delegated to him the performance of any duty with respect to the mortgage, or had any reason to suspect the fraudulent design, or was negligent in not detecting the fraud at the time of its perpetration or thereafter. In such case, even a *bona fide* purchaser of the mortgaged premises though he bought in the honest belief that the mortgage had been actually satisfied, took, nevertheless, subject to its lien. *Luther* v. *Clay*, 100 Ga. 286 (28 S. E. Rep. 46; 89 L. R. A. 95). The court say: "The contest was between a mortgagee, who was the victim of the theft of the mortgage and a forged cancellation of the same, entered upon the record, and the purchaser, who bought in good faith, believing that the cancellation as it appeared of record was genuine, and authorized. That title to property cannot be taken away by theft is a principle well settled. The seller can convey no greater title than he himself possesses. Civ. Code, § 3588, 2 Schouler, Pers. Prop.

(3d Ed.), § 19. It is equally well settled that an owner of property will not be deprived of his right to the same by the commission of a forgery, and this is true even where the claimant under the forged instrument had no notice of the forgery, and honestly believed that it was honest and genuine. *Sampeyreac* v. *U. S.*, 7 Pet, 222–240; *Van Amringe* v. *Morton*, 4 Whart. 382; *D' Wolf* v. *Haydn*, 24 Ill. 525; *Arrison* v. *Harmstad*, 2 Pa. St. 191; *Wallace* v. *Harmstad*, 44 Pa. St. 492; *Gray* v. *Jones*, 14 Fed. Rep. 83; *Reck* v. *Clapp*, 98 Pa. St. 581–586; *Telegraph Co.* v. *Davenport*, 97 U. S. 372."

Sec. 609. Record entry of satisfaction—Statutes amended and new statutes. Ala Code (1696), §§ 1065, 1066—entry of partial payment or full payment upon record of mortgage or deed of trust—amended, Laws 1898–99, p. 26. Arizona has a penal statute requiring the entry of record of the satisfaction of release of a mortgage or deed of trust, upon full payment thereof. Laws 1899, p. 78. Me. Rev. Stat., ch. 90, § 28—entry of satisfaction by mortgagee upon payment of mortgage—fine for failure to do so—amended, Laws 1899, p. 118. Minn. Gen. Stat. 1894, § 4196—entry of satisfaction of mortgage upon record—amended, Laws 1899, p. 191. N. Dak. Rev. Codes, § 4718, relating to the discharge of recorded mortgages by entry on the margin of the record thereof is repealed. Laws 1899, p. 93. Va. Code, § 2498—entry of record of satisfaction of mortgage—amended, Laws 1897–98, pp. 594, 935.

Sec. 610. Penalty for failure to enter satisfaction—Statutes construed. Where a husband and wife who join in the execution of a mortgage jointly, sue to recover the statutory penalty for an alleged failure on the part of the mortgagee to enter satisfaction of the mortgage on the record, he will not be allowed to dispute the interest of both in the satisfaction of the mortgage and their statutory right to sue for the penalty by showing that the mortgaged property was owned by the wife alone. In such action the burden of proof is on the plaintiff, and when he introduces the entries and credits made on the record he should explicitly show that no entry of satisfaction has been made. *Thomason Grocery Co.* v. *Mitchell*, 114 Ala. 315 (21 So. Rep. 461). Va. Code, § 2498, applied

—summary remedy for having mortgages satisfied. *Turnbull* v. *Mann*, 94 Va. 182 (26 S. E. Rep. 510).

Sec. 611. Strict foreclosure. Where, after the execution of a mortgage, the mortgagor conveys a portion of the premises to a city which devotes them to highway purposes, and subsequently the mortgagee has a decree of foreclosure and sale without making the city a party, he is not entitled, in a second action of foreclosure brought against the city, to a strict foreclosure without sale, barring the city of all right in the premises, unless it redeems the entire tract by paying the whole amount due on the mortgage. *Morey* v. *City of Duluth*, 69 Minn. 5 (71 N. W. Rep. 694).

Sec. 612. When foreclosure proceedings may be commenced. Where a mortgagee takes a note for a given amount and executes an agreement to advance money to his mortgagor to that amount, he cannot maintain an action to foreclose his mortgage until he has advanced the full amount of the loan. *Savings Bank* v. *Asbury*, 117 Cal. 96 (48 Pac. Rep. 1081). In the absence of any provision in a mortgage entitling the mortgagee to a foreclosure thereof, prior to the time the debt falls due which is secured thereby, a court of equity cannot decree foreclosure until the time limited for the payment of such debt has expired. *Kirk* v. *Van-Petten*, 38 Fla. 335 (21 So. Rep. 286). A covenant in a mortgage executed in settlement of bastardy proceedings, the parties to which unite in marriage, which binds the husband to "support and kindly treat" his wife, is broken so that the mortgage may be foreclosed where the conduct of the husdand is such as to drive his wife from home. *Porter* v. *Caylor*, 146 Ind. 448 (45 N. E. Rep. 648). Where a mortgage provides that upon the mortgagor making certain default the mortgagee may declare the entire debt due and "may proceed and collect the same, and by foreclosure of the mortgage given to secure the same, either under a power of sale therein contained, or by suit or other proceedings in court, or otherwise as they may elect," it is held that the right to have the foreclosure of a mortgage is not barred by the fact that the mortgagee has procured a judgment at law for the debt which has

not been collected; and it is not a sufficient denial of an allegation in a complaint of foreclosure on such a mortgage that an execution has been issued and returned unsatisfied, to simply allege that such execution was not "duly" returned. *St. Paul F. & M. Ins. Co.* v. *Dakota L. & Live Stock Co.*, 10 S. Dak. 191 (72 N. W. Rep. 460).

Sec. 613. Breach authorizing foreclosure—Failure to pay taxes or interest. Where a mortgage provides that "if said sum * * * is not paid when the same is due, and if the taxes and assessments * * * * are not paid, * * * then said party of the second part shall be entitled to the possession of said premises," a default in the payment of taxes authorizes the mortgagee to treat the note and mortgage as matured. *Johnson* v. *Irwin*, 16 Wash. 652 (48 Pac. Rep. 345). Where a mortgage securing a note due in a specified number of years provides that it may be foreclosed if the debtor fails to pay the taxes for a given number of days, a failure to pay taxes within the specified time is a breach authorizing foreclosure, from which the debtor cannot be relieved where he has no excuse except mere forgetfulness or oversight. *Arkenburgh* v. *Lakeside Residence Ass'n*, 56 N. J. Eq. 102 (38 Atl. Rep. 297). Where a mortgage to secure the payment of several notes due at different times, interest thereon payable annually, stipulated that "if said sum or sums of money or any part thereof, or any interest thereon, is not paid when the same is due, and if the taxes and assessments of every nature which are or may be assessed and levied against said premises, or any part thereof, are not paid when the same by law are made due and payable, then the whole of said sum or sums, and interest thereon, shall, and by these presents, become due and payable," it is held that in order to authorize a foreclosure before the time stated in the notes, two conditions must concur, namely, default in the payment of a sum when due, and default in the payment of the taxes on the mortgaged premises when due. *Lewis* v. *Lewis*, 58 Kan. 563 (50 Pac. Rep. 454). The right to foreclose for the entire indebtedness on account of a default in the payment of interest, given by the terms of a mortgage, may be waived by accepting payment of such interest after default. *Mason* v. *Luce*, 116 Cal. 282

(48 Pac. Rep. 72). A mortgagee having the right to declare the debt due and foreclose, upon the mortgagor's delinquency in the payment of any installment of interest, does not waive this option by his failure to exercise it at the first opportunity. *Industrial Land Develop. Co.* v. *Post*, 55 N. J. Eq. 559 (37 Atl. Rep. 892). The right to foreclose a mortgage given to secure two notes, on account of a default in the payment of interest, is not postponed by the granting of an extension of time for a consideration in which to pay one of the notes. *Germond* v. *Hermosa Ice Co.*, 9 S. Dak. 387 (69 N.W. Rep. 578).

Sec. 614. Effect of tender after default. When a mortgage securing payment of several bonds is in process of foreclosure, an offer to pay that one of the bonds which is held by the complainant, and the costs of the pending foreclosure to date, accompanied by a demand for an assignment of the bond, is not such a tender as will stop the running of interest or the accruing of costs. *Whittaker* v. *Belvidere Roller-Mill Co.*, 55 N. J. Eq. 674 (38 Atl. Rep. 289). In the case of *McClung* v. *Missouri Trust Co.*, 137 Mo. 106 (38 S.W. Rep. 578), Division two of the supreme court of Missouri, after a review of numerous cases say: "Whatever the law may be elsewhere it seems to be settled in this state that a tender of debt and interest secured by mortgage made after default destroys the mortgage lien." In a subsequent opinion by this court, in banc, in the case of *Hudson Bros. Com. Co.* v. *Glencoe Sand & Gravel Co.*, 140 Mo. 103 (41 S. W. Rep. 450; 62 Am. St. Rep. 722), it is held that in an action of ejectment by one claiming as a purchaser at a sale made under a deed of trust after default, it is no defense to allege a tender of the debt after such default. In this case the court refers to the former opinion and seem to regard it as holding just the opposite to the quotation given above, and after an elaborate review of the cases they state their conclusion as follows: "Our opinion is that a tender of the amount due on a mortgage debt made after default, should not, on principle, discharge the mortgage and should have no greater effect on the security than it has on the debt itself, and that the result will be the same whether the mortgagee holds the legal title in trust or as a mere security."

Sec. 615. Foreclosure proceedings—General principles—Practice. The possession of a mortgage and the notes which it is given to secure, although held for collection, is sufficient to sustain one's right to maintain an action to foreclose. *Woodward* v. *Brown*, 119 Cal. 288 (51 Pac. Rep. 2; 63 Am. St. Rep. 108). An allegation that a mortgage was executed and delivered, is broad enongh to include the signing, sealing, attestation, and acknowledgment; and when a mortgage is admitted in evidence, the certificate of acknowledgment goes with it. *Laurent* v. *Lanning*, 32 Or. 11 (51 Pac. Rep. 80). A real estate mortgage duly witnessed and acknowledged, is, of itself, *prima facia* evidence that the mortgagor signed said mortgage. *Greely State Bank* v. *Line*, 50 Neb. 484 (69 N. W. Rep. 966). A certificate of acknowledgment attached to a mortgage is *prima facia* evidence of its due execution; and the recitals in a mortgage are sufficient to show an indebtedness, and also to prove *prima facie*, the execution of the obligation, the payment of which it is given to secure. *Andrews* v. *Reed*, Kan. (48 Pac. Rep. 29). Where a defense is based upon alterations claimed to have been made in the mortgage it is admissible in evidence of its execution, and the burden of proof is upon defendant to show the alterations claimed. *Cosgrave* v. *Fanebust*, 10 S. Dak. 218 (72 N. W. Rep. 469). The holder of a mortgage has a right to a second foreclosure as to parties having an interest in the premises who were omitted from the first foreclosure. Such second foreclosure does not affect the rights of the mortgagor who is a party to the first foreclosure and he need not be made a party to the suit. *Morey* v. *City of Duluth*, 69 Minn. 5 (71 N. W. Rep. 694.) Where a decree of foreclosure is void on account of the failure of the plaintiff to make certain persons parties thereto, he may maintain a second action to foreclose, it appearing that he exercised due diligence in ascertaining the necessary parties to the previous action. *Brackett* v. *Banegas*, 116 Cal. 278 (48 Pac. Rep. 90; 58 Am. St. Rep. 164). Where a mortgagee is authorized to pay taxes in case of the mortgagor's failure to do so and include such payment in his lien, it is proper to include the amount of money so paid by the mortgagee in a decree of foreclosure in his favor,

Farwell v. *Bigelow*, 112 Mich. 285 (70 N. W. Rep. 579), including moneys paid after the bill of foreclosure is filed but before the decree is rendered. *Jehle* v. *Brooks*, 112 Mich. 181 (70 N. W. Rep. 440). Where a son to whom land had been deeded by his parents, gave them a mortgage thereon to secure his bond in a specified penal sum, conditioned to be void if he paid them a certain portion of the proceeds of the premises and furnished them certain items for their support, it is held that upon foreclosure of the mortgage, recovery is limited to the amounts which the son failed to pay according to the contract. *Heidtke* v. *Krause*, 97 Wis. 118 (72 N. W. Rep. 351). Where a complaint alleges that the defendant holds some lien the nature of which is unknown to the plaintiff, but which is junior to the plaintiff's lien, and the defendant denies this allegation and files a cross bill to foreclose a mortgage which was not recorded in time, but which is alleged to be prior to the plaintiff's mortgage, it is held that the determination of the priority of the liens was within the issue. *Schmidt* v. *Zahrndt*, 148 Ind. 447 (47 N. E. Rep. 335). Particular evidence examined and held to authorize a decree of foreclosure. *Greenman* v. *Swan*, 51 Neb. 81 (70 N. W. Rep. 504). Ga. Laws 1887, p. 64, construed and applied—jurisdiction in actions for foreclosure. *Block* v. *Allen*, 99 Ga. 417 (27 S. E. Rep. 733). Ky. Civ. Code, §§ 62, 65, applied—jurisdiction of action to foreclose mortgage. *Shields* v. *Yellman*, 100 Ky. 655 (39 S. W. Rep. 30). Mass. Pub. Stat., ch. 181, § 1, construed and applied—three years' possession as a condition of foreclosure by entry. *Long* v. *Richards*, 170 Mass. 120 (48 N. E. Rep. 1083; 64 Am. St. Rep. 281). N. Y. Code Civ. Proc., § 3253, construed and applied—additional allowance of costs. *Waterbury* v. *Tucker & Carter C. Co.*, 152 N. Y. 610 (46 N. E. Rep. 959). S. C. Code Civ. Proc., § 267, applied—reference to referee to ascertain amount due—effect of inconsequential errors in calculation. *Johnson* v. *Masters*, 49 S. C. 525 (27 S. E. Rep. 474).

Sec. 616. Complaint in foreclosure proceedings. A complaint to foreclose a mortgage given to secure a note for $80,000 sufficiently avers the amount of the mortgage debt, where it alleges that the actual amount of indebtedness was

and is $12,500. *Savings Bank* v. *Asbury*, 117 Cal. 96 (48 Pac. Rep. 1081). Where a complaint seeking to foreclose against a grantee who assumed a mortgage debt sets out the covenant of assumption, it must clearly allege that such covenant referred to the mortgage sought to be foreclosed. *Clifford* v. *Minor*, 67 Minn. 512 (70 N. W. Rep. 798). A complaint in foreclosure need not define the nature of the interest which the defendants have in the mortgaged estate, when the peculiar nature of this interest is unimportant to the relief sought. *Doremus* v. *Dunham*, 55 N. J. Eq. 511 (37 Atl. Rep. 62). Where a complaint to foreclose a mortgage by the equitable owner of bonds secured by it was insufficient at the time of its filing because it did not aver that the mortgage had matured, it cannot be cured by an amendment averring supplementary facts not existing at the time of the filing of the bill. *Scheerer* v. *Agee*, 113 Ala. 383 (21 So. Rep. 81). Applying Neb. Code Civ. Proc., §§ 850, 851, it is held that whether any proceedings at law has been had for the recovery of a real estate mortgage debt, or any part thereof, and whether such debt, or any part of it, has been paid, are essential facts, which must be averred in the petition filed to foreclose such mortgage; and unless the petition contains such averments, it will not state facts sufficient to entitle the plaintiff to the relief he demands. *Bing* v. *Morse*, 51 Neb. 842 (71 N. W. Rep. 712). Particular complaint to foreclose against a deceased mortgagor, held sufficient under S. C. Const. 1868, art. 5, § 8. *Rutherford* v. *Johnson*, 49 S. C. 465 (27 S. E. Rep. 470).

Sec. 617. Parties to foreclosure proceedings. A person to whom part of the premises have been conveyed is a necessary party. *Woodward* v. *Brown*, 119 Cal. 283 (51 Pac. Rep. 2; 63 Am. St. Rep. 108). A decree foreclosing a mortgage upon a homestead is void where the wife of the mortgagor is not made a party. *Brackett* v. *Banegas*, 116 Cal. 278 (48 Pac. Rep. 90; 58 Am. St. Rep. 164). Upon foreclosure of a purchase money mortgage, a prior judgment creditor claiming title under a previous execution sale, is a proper party defendant. *Bisbee* v. *Carey*, 17 Wash. 224 (49 Pac. Rep. 220). The officers of a corporation mortgagor are not necessary or proper parties. *Johnes* v. *Outwater*, 55 N.

J. Eq. 398 (36 Atl. Rep. 488). In an action against a grantee assuming and agreeing to pay a mortgage debt, an endorser of the note is not a necessary party. *Morgan* v. *South Milwaukee Lake View Co.*, 97 Wis. 275 (72 N. W. Rep. 872). One who has disposed of all his interest in the mortgaged property is not a necessary party. *Ingham* v. *Weed*, Cal. (48 Pac. Rep. 818); *Johnes* v. *Outwater*, 55 N. J. Eq. 398 (36 Atl. Rep. 488). In California it is held that heirs of a deceased mortgagor are not necessary parties defendant, *Finger* v. *McCaughey*, 119 Cal. 59 (51 Pac. Rep. 13); and in Illinois an administrator of a deceased mortgagor is not a necessary party where no personal judgment is sought. *Roberts* v. *Tunnell*, 165 Ill. 631 (46 N. E. Rep. 713). Where the foreclosure of a mortgage affects an estate limited over to persons not in being, they are represented by the living owner of the first estate of inheritance and are bound by a decree to which he is a party. *Doremus* v. *Dunham*, 55 N. J. Eq. 511 (37 Atl. Rep. 62). Applying Ky. Civ. Code, § 21, it is held that a trustee to whom is given a mortgage on lands to secure bonds sold to third persons, may, on default, maintain an action to foreclose the mortgage without joining with him the holders of the bonds. *Union Trust Co.* v. *Broshears*, Ky. (39 S. W. Rep. 44). Where a mortgage given to secure the payment of several bonds held by divers persons, provides a method for the procuring of the appointment of a new trustee in case of a vacancy, a holder of a portion of the bonds cannot maintain a bill to foreclose the mortgage, where the position of trustee is vacant without procuring the appointment of another trustee and making him a party, and he will not be relieved from this duty by the bare allegation in his complaint that its performance would necessitate expense and delay. *Johnes* v. *Outwater*, 55 N. J. Eq. 398 (36 Atl. Rep. 488). A decree of foreclosure had on an *ex parte* petition of the mortgagee made under Md. Pub. Local Laws, art. 4, §§ 692–704, is not rendered invalid on account of the holder of a subsequent lien not being a party thereto. *Hughes* v. *Riggs*, 84 Md. 502 (36 Atl. Rep. 269).

Sec. 618. Defenses to foreclosure proceedings. A defendant cannot show by parol evidence that the mortgage

sought to be foreclosed was in fact a deed. *Goon Gan* v. *Richardson*, 16 Wash. 378 (47 Pac. Rep. 762). Where a prior mortgage is valid it is no defense to its foreclosure for a subsequent mortgagee to show that the plaintiff acquired his title by gift. *Dyer* v. *Dean*, 69 Vt. 370 (37 Atl. Rep. 1118). A grantee who assumes the payment of a mortgage cannot defend against an action of foreclosure by an assignee thereof, by showing that there was no consideration for the assignment. *Terry* v. *Durand Land Co.*, 112 Mich. 665 (71 N. W. Rep. 525). It is no defense to an action for foreclosure brought by an assignee of the mortgage to show that the assignment has not been recorded for the purpose of avoiding the payment of taxes. *Terry* v. *Durand Land Co.*, 112 Mich. 665 (71 N. W. Rep. 525). A defense, by persons who took conveyances after the execution and recording of the mortgage, based upon a contract made by them with the mortgagor, is not available without a showing of their compliance with it and that such agreement was made in a manner to be binding upon the mortgagee. *Horner* v. *Warfield*, 180 Pa. St. 103 (36 Atl. Rep. 418). Where a mortgage stipulates for the release of a certain amount of the land upon the payment of a specified sum by the mortgagor, this privilege may be exercised by a purchaser from the mortgagor after the bill has been filed to foreclose the mortgage, and where his first answer setting up the privilege is insufficient on account of the insufficiency of his tender, he may be permitted to file a supplementary answer setting up a later tender and demand. *Hall* v. *Home Bldg. Co.*, 56 N. J. Eq. 304 (38 Atl. Rep. 447). Particular denials of nonpayment held insufficient to require proof of nonpayment by plaintiff. *Westbay* v. *Gray*, 116 Cal. 660 (48 Pac. Rep. 800). Particular evidence held insufficient to sustain the claim of the grantee of a portion of mortgaged premises to the effect that his purchase was made under an agreement between him and the parties to the mortgage, that such portion of the property was to be released from the mortgage. *Parker* v. *Harvey*, N. J. Eq. (36 Atl. Rep. 681).

Sec. 619. Defenses to foreclosure of purchase money mortgage. In order for the maker of a purchase

money mortgage to defend against its foreclosure on the ground that the sale of the premises to him was effected by fraudulent representations, he must show that he relied upon such representations. *Ackman* v. *Jaster*, 179 Pa. St. 463 (36 Atl. Rep. 324). A breach of covenants in a deed against incumbrances or for good title is no defense against proceedings to foreclose a mortgage given on the land for part of the consideration money, except in cases where there has been an eviction by title paramount or an action is pending to try the title to the mortgaged premises. A further exception exists where actual fraud in the transaction is alleged and proven. *Frenche* v. *McConnell*, N. J. L. (38 Atl. Rep. 687). In an action brought to foreclose a purchase money mortgage given to the vendor, the mortgagor and his subsequent grantee will be allowed to show as a partial defense that a valuable portion of the land which the mortgagee undertook to convey has been taken and held by another under a paramount title. *Chaffey* v. *Boggs*, 179 Pa. St. 301 (36 Atl. Rep. 241). A vendee cannot defend against a purchase money mortgage given to a corporation for land purchased of it on the ground of the corporation's failure to perform an agreement executed by its president, without authority, in reference to a supposed outstanding claim of title held by a third party, nor can a reduction be claimed on account of such supposed claim, where the vendee has not been disturbed or suffered any damages. *National Bank* v. *Levanseler*, 115 Mich. 372 (73 N. W. Rep. 399).

Sec. 620. Fraud and duress as a defense to foreclosure proceedings. Where a mortgage is given upon a new and valuable consideration, it is no defense to its foreclosure to allege that it was made in relation to property respecting which there had been prior fraudulent and unlawful transactions between the parties. *Stewart* v. *Chicago Gen. St. Ry. Co.*, 166 Ill. 61 (46 N. E. Rep. 765). Where a mortgagee can show a *prima facie* right to recover on the face of the instrument without revealing any fraud in the transaction, the defendant will not be permitted to plead as a defense that the mortgage was executed for the purpose of defrauding his creditors of which purpose the mortgagee was

aware. *Barwick* v. *Moyse*, 74 Miss. 415 (21 So. Rep. 288; 60 Am. St. Rep. 512). Citing, *Harvey* v. *Varney*, 98 Mass. 118; *Boncsteel* v. *Sullivan*, 104 Pa. St. 9; *Williams* v. *Williams*, 84 Pa. St. 312; *Walker* v. *Brungard*, 13 Smedes & M. 723. The defense of duress is available to the wife in an action to foreclose a mortgage upon the homestead which she was compelled to sign through fear of bodily harm and abandonment by her husband, although it was given to secure the payment of a negotiable promissory note that had been transferred to an innocent holder before maturity. *Berry* v. *Berry*, 57 Kan. 691 (47 Pac. Rep. 837; 57 Am. St. Rep. 351).

Sec. 621. Usury as a defense to foreclosure proceedings. A statutory penalty for taking usurious interest cannot be enforced against a state seeking to foreclose a school fund mortgage, where the effect would be to reduce the school fund in violation of Idaho Const., art. 9, § 8. *State* v. *Fitzpatrick*, Idaho (51 Pac. Rep. 112). A mortgage given to a corporation is affected by the usurious act of an officer of the corporation who consummated the transaction. *Camden Fire Ins. Co.* v. *Reed*, N. J. Eq. (38 Atl. Rep. 667). Cal. Civ. Code, § 1919, which provides that the parties may agree that the interest due shall become a part of the principal and thereafter bear the same rate of interest as the principal debt, prohibits a contract for compound interest at a higher rate than the principal bears, and where a contract for compound interest is illegal for this reason no compound interest can be recovered. *Yndart* v. *Den*, 116 Cal. 533 (48 Pac. Rep. 618; 58 Am. St. Rep. 200). The plea of usury should set forth the facts constituting the usury. *Stanley* v. *Chicago Trust & Sav. Bank*, 165 Ill. 295 (46 N. E. Rep. 273). Where a deed of trust to secure a loan executed between parties residing in different states specifies that the law of the state where the land is situated shall govern, such law governs the question of interest although the contract would be void by the law of the state where the lender resides. Bourland, Sp. J., and Wood, J., dissenting. *Lanier* v. *Union Mort. Banking & Trust Co.*, 64 Ark. 89 (40 S. W. Rep. 466). Citing, *Dugan* v. *Lewis*, 79 Tex. 246 (14 S. W. Rep. 1024; 23 Am. St. Rep. 332; 12 L. R. A. 93). But where a mort-

gage note given to a foreign corporation is made payable in its state where it is legal, for the evident purpose of evading the usury laws of the state in which it must be enforced, the usury laws of the latter state will be held to govern in its enforcement. *Building & Loan Ass'n* v. *Griffin*, 90 Tex. 480 (39 S. W. Rep. 656). To the same effect is the case of *Pryse* v. *People's Bldg., Loan & Sav. Ass'n*, Ky. (41 S. W. Rep. 574).

Construing and applying Ga. Code, § 2057f, which declares, " all titles to property made as part of a usurious contract or to evade the laws against usury are void," it is held that the plea of usury is a personal one and the right to have a title declared void rests with the borrower and his personal representatives and privies, and where one conveyed land absolutely as a security for a usurious debt, stipulating for a reconveyance to a third party upon its payment, it is held that he parted with his equity of redemption and could not assail the title on account of usury. *Scott* v. *Williams*, 100 Ga. 540 (28 S. E. Rep. 248; 62 Am. St. Rep. 340). Under Ga. Code, § 2057f, a conveyance given to secure the payment of an obligation infected with usury is void, and may be disregarded by the grantor or his personal representatives. *Equitable Mort. Co.* v. *Braswell*, 98 Ga. 189 (26 S. E. Rep. 487). Substantially the same is held in *Pottle* v. *Lowe*, 99 Ga. 576 (27 S. E. Rep. 145; 59 Am. St. Rep. 246). A grantee in a deed given to secure a debt which is tainted with usury cannot, as against the maker thereof, convey a good title, even to a person who takes *bona fide* before maturity, for value, and without notice of the fact of usury. *Beach* v. *Lattner*, 101 Ga. 857 (28 S. E. Rep. 110). Under Mill. & V. Tenn. Code, § 3930, one foreclosing a mortgage given to secure a usurious note must pay the costs of the action. *Kelton* v. *Brown*, Tenn. (39 S. W. Rep. 541).

Sec. 622. Usury as a defense to foreclosure proceedings—What constitutes usury—Bonus or commission to broker. Requiring the payment in advance of the highest rate of interest allowed, is not usury. *Willett* v. *Maxwell*, 169 Ill. 540 (48 N. E. Rep. 478); *Swanson* v. *Realization & Debenture Corp.*, 70 Minn. 380 (73 N. W. Rep. 165). Nor

is it usury to compute the interest at the highest rate allowed on the amount to be paid at maturity, and deduct the interest so computed from that amount and pay the borrower the difference. *Steen* v. *Stretch*, 50 Neb. 572 (70 N. W. Rep. 48). Including in a mortgage a sum due a broker for procuring a loan to secure which it is given, which the mortgagee agrees to pay the broker when he collects it from the mortgagor, does not render the mortgage usurious. *Secor* v. *Patterson*, 114 Mich. 37 (72 N. W. Rep. 9). The fact that an agent, without the authority, consent, or knowledge of his principal upon loaning the money of the latter, exacts from the borrower a sum in the nature of a bonus in excess of the lawful interest, does not make the loan usurious. *Barger* v. *Taylor*, 30 Ore. 228 (47 Pac. Rep. 618). Citing, *Van Wyck* v. *Watters*, 81 N. Y. 352; *Cox* v. *Insurance Co.*, 113 Ill. 385; *Estevez* v. *Purdy*, 66 N. Y. 446; *Phillips* v. *McKellar*, 92 N. Y. 34; *Ammerman* v. *Ross*, 84 Ia. 359 (51 N. W. Rep. 6); *Vahlberg* v. *Keaton*, 51 Ark. 534 (11 S. W. Rep. 878; 14 Am. St. Rep. 73; 4 L. R. A. 462); *Bell* v. *Day*, 32 N. Y. 165; *Condit* v. *Baldwin*, 21 N. Y. 219 (78 Am. Dec. 137); *Nichols* v. *Osborn*, 41 N. J. Eq. 92 (3 Atl. Rep. 155); *Brigham* v. *Myers*, 51 Ia. 397 (1 N. W. Rep. 613; 33 Am. Rep. 140); *Rogers* v. *Buckingham*, 33 Conn. 81; *Greenfield* v. *Monaghan*, 85 Ia. 211 (52 N. W. Rep. 193). Construing and applying S. C. Rev. Stat., §§ 1390, 1391, it is held that a mortgage note may be rendered usurious by the lender's agent deducting a commission from the amount loaned with the knowledge and consent of the lender, although the interest charged computed upon the amount actually received by the borrower does not exceed the statutory rate. *Land Mortg. Inv. & Agency Co.* v. *Gillam*, 49 S. C. 345 (26 S. E. Rep. 990). For further construction of this statute, see *Ryan* v. *Southern Mut. Bldg. & L. Ass'n*, 50 S. C. 185 (27 S. E. Rep. 618; 62 Am. St. Rep. 831). In Georgia it is held that a loan of money made in consideration of the maximum legal rate of interest and one-half of the commission charged by a third person for negotiating the loan is usurious. It is immaterial whether the third person is the agent of the lender, of borrower, or of both. *Pottle* v. *Lowe*, 99 Ga. 576 (27 S. E. Rep. 145; 59 Am. St. Rep. 246).

Sec. 623. Statute of limitations—Statutes construed. Foreclosure of a mortgage is not barred where the debt is not barred. *Roberts* v. *Tunnell*, 165 Ill. 631 (46 N. E. Rep. 718). But a mortgage may be foreclosed although an action on the obligation secured is barred by the statute of limitations. *Demuth* v. *Old Town Bank*, 85 Md. 315 (37 Atl. Rep. 266; 60 Am. St. Rep. 322). And the foreclosure may be had in such cases even as against a purchaser of the mortgaged property. *Ellis* v. *Fairbanks*, 38 Fla. 257 (21 So. Rep. 107). Citing, *Inge* v. *Boardman*, 2 Ala. 331; *Fievel* v. *Zuber*, 67 Tex. 275 (3 S. W. Rep. 278); *Norton* v. *Palmer*, 142 Mass. 433 (8 N. E. Rep. 346). The statute of limitations begins to run against the right to recover a deficiency at the time the mortgage debt becomes due. *Thompson* v. *Cheesman*, 15 Utah 43 (48 Pac. Rep. 477). A provision in a mortgage that the entire sum shall become due in case of default in the payment of interest on the note which it is given to secure, does not start the statute of limitations to running against its foreclosure, where there has been such a default, but the statute begins to run only when the note matures according to its terms. *Mason* v. *Lucc*, 116 Cal. 232 (48 Pac. Rep. 72); *Richards* v. *Daley*, 116 Cal. 336 (48 Pac. Rep. 220). Waiving the question as to whether or not a mortgagor's possession of the premises for 20 years after default bars foreclosure, it is held that as a payment made within that period by an owner of the equity of redemption of a part of the mortgaged premises inures to the benefit of such owner, such payment operates to interrupt the running of the statute. *Longstreet* v. *Brown*, N. J. Eq. (37 Atl. Rep. 56).

Sand. & H. Ark. Dig., §§ 5094, 5095, fixing the same period of limitation upon a mortgage as would bar the debt secured by it, and providing that in order for payments to extend the period of limitation, they must be endorsed on the margin of the record of the mortgage, and allowing one year from the enactment of the statute for the foreclosure of mortgages, which would otherwise be barred by its provisions, in less than one year, is constitutional. *Hill* v. *Gregory*, 64 Ark. 317 (42 S. W. Rep. 408). The statute only applies to payments made after its passage. Battle, J., Dissenting. *Fay-*

etteville Bldg & L. Ass'n v. *Bowlin*, 68 Ark. 573 (59 S. W., Rep. 1046). Under this statute, suits in equity to foreclose, as well as suits at law for possession of mortgaged property, must be brought within the period of limitation for a suit on the debt which the mortgage or deed of trust was given to secure. *American Mortg. Co.* v. *Milam*, 64 Ark. 305 (42 S. W. Rep. 417). Construing and applying Idaho Rev. Stat., § 4520, providing that "there can be but one action for the recovery of any debt, or the enforcement of any right secured by mortgage upon real estate or personal property," it is held that when an action on a debt is barred, an action to foreclose a lien securing it is likewise barred. *Law* v. *Spence*, Idaho (48 Pac. Rep. 282). Or. Code Civ. Proc., § 25, providing that whenever any payment has been made on an existing contract after it becomes due, "the limitation shall commence from the time the last payment was made;" does not apply to payments on a mortgage debt made by the grantee of the mortgagor who did not assume its payment, in order to protect him on his subsequent covenant of warranty, so as to prevent the statute of limitations from running in favor of the original debtor or the subsequent grantees. *Dundee Mortg. & T. Inv. Co.* v. *Horner*, 30 Or. 558 (48 Pac. Rep. 175).

Sec. 624. Judgment in foreclosure proceedings. A conditional judgment of foreclosure cannot be entered under Wis. Rev. Stat., § 3162. *Spengler* v. *Hahn*, 95 Wis. 472 (70 N. W. Rep. 466). Where a mortgage specifies the amount for which it is a lien, it is error to give judgment of foreclosure for a larger sum. *Home Fire Ins. Co.* v. *Fitch*, 52 Neb. 88 (71 N. W. Rep. 940). A judgment foreclosing a mortgage which does not determine with certainty the amount due upon the mortgage, is void. *Vermont Loan & T. Co.* v. *McGregor*, Idaho (51 Pac. Rep. 104). Upon the foreclosure of several mortgages, some of which cover several lots and some of which cover only a portion of them, the decree of sale should be made in accordance with the mortgages. *Hibernia Sav. & L. Soc.* v. *Kain*, 117 Cal. 478 (49 Pac. Rep. 578). Where collateral security

consists of the obligation of the pledgor executed to himself secured by a trust deed, the holder may have a decree foreclosing for the amount actually due him from the pledgor. *Stanley* v. *Chicago Trust & Sav. Bank*, 165 Ill. 295 (46 N. E. Rep. 278). Where a decree adjudicates the rights of two mortgagees whose mortgages cover the same property and orders a sale of the property, its subsequent reversal as to their relative rights will not invalidate the sale but will merely alter the disposition of the proceeds. *Hinchman* v. *Point Defiance Ry. Co.*, 17 Wash. 399 (49 Pac. Rep. 1061). Where, in an action to foreclose an installment mortgage, a decree is duly entered and signed by the judge directing a sale to satisfy an installment due, such decree cannot be subsequently amended on motion of the plaintiff so as to provide for further sales on subsequent defaults in the payment of other installments. *Byrne* v. *Hoag*, 116 Cal. 1 (47 Pac. Rep. 775).

Sec. 625 Personal judgment in foreclosure proceedings. The plaintiff may have personal judgment on the note although the mortgage given to secure its payment is void. *American Sav. & L. Ass'n* v. *Burchardt*, 19 Mont. 823 (48 Pac. Rep. 891; 61 Am. St. Rep. 507). A personal judgment for a deficiency should not be given against a grantee of the mortgaged premises unless such relief is prayed for in the bill. *Fisher* v. *White*, 94 Va. 286 (26 S. E. Rep. 573). Where a personal judgment is not asked for or given to the plaintiff at the time of a foreclosure decree, he cannot subsequently, on motion and without notice to the defendant, have the decree amended so as to provide for a personal judgment. *Scamman* v. *Bonslett*, 118 Cal. 93 (50 Pac. Rep. 272; 62 Am. St. Rep. 226). A personal judgment for a deficiency cannot be rendered before the deficiency becomes due by the terms of the contract. Wis. Rev. Stat., § 3162, applied. *Packard* v. *Kinzie Ave. Heights Co.*, 96 Wis. 114 (70 N.W. Rep. 1066). Upon foreclosure of a second mortgage, a deficiency judgment should be given to the holder for the balance due on it, and not for the amount due on the first mortgage and such balance. *Kasson* v. *Tousey*, 96 Wis. 511 (71 N. W. Rep. 894). A defendant cannot complain because a personal judgment is rendered against him for any

deficiency instead of the whole amount of the mortgage debt. *Block* v. *Allen*, 99 Ga. 417 (27 S. E. Rep. 737). Where there is a deficiency decree against one of several makers of a promissory note, and no disposition of the case as to the others is directly made, further than to decree that their equity of redemption is barred, the cause of action is barred in a subsequent suit on the note against those not included in the deficiency decree. *Travelers' Ins. Co.* v. *Mayo*, 170 Ill. 498 (48 N. E. Rep. 917). A court of equity having jurisdiction in an action to foreclose a mortgage to which nonresident purchasers of property are parties, may render judgment for damages on account of waste committed by them to the extent it rendered the security inadequate. *Tate* v. *Field*, 56 N. J. Eq. 85 (37 Atl. Rep. 440). Applying Colo. Code 1887, § 17, it is held that a personal judgment cannot be rendered on a cross complaint against one who has not been duly served with a copy thereof. Where there is a contest between successive grantees assuming the mortgage debt as to their liability, a personal judgment should not be rendered without bringing in as parties all the interested grantees. *Skinner* v. *Harker*, 23 Colo. 333 (48 Pac. Rep. 648). A mortgagor against whom a deficiency judgment has been rendered, whose grantee has assumed the payment of the mortgage, is not entitled to a judgment against such grantee for the deficiency until he has paid the same. *O'Neal* v. *Hart*, 116 Cal. 69 (47 Pac. Rep. 926). Particular cases in which the allowance of a personal judgment was held proper. *Louisville Banking Co.* v. *Blake*, 70 Minn. 252 (73 N. W. Rep. 155); *Connor* v. *Jones*, S. Dak. (72 N. W. Rep. 468).

Sec. 626. Personal judgment in foreclosure proceedings—Statutes construed. Construing and applying Utah Comp. Laws 1888, § 3460, providing that there can be but one action for the recovery of a debt or the enforcement of any right secured by a mortgage upon real estate or personal property, and that a personal judgment can be rendered only when it is made to appear from the return of the officer making the sale of the property that the proceeds are insufficient to pay the debt, it is held that a mortgagee or assignee

of a note cannot recover a personal judgment unless the proceeds of the sale and the property mortgaged prove to be insufficient, and where the right to foreclose the lien has been lost there can be no personal judgment. *Donaldson* v. *Grant*, 15 Utah 231 (49 Pac. Rep. 779). Construing and applying Cal. Code Civ. Proc., § 726, which contains similar provisions, it is held that a mortgagee cannot have a personal judgment in case of a deficiency of the proceeds of a foreclosure sale where he has previously released part of the property from the mortgage without the consent of the mortgagor; and the mortgagee's rights in such a case are not enlarged by the fact that at the time of the release of the property it was conveyed by the mortgagor to another with covenants against incumbrances. *Woodward* v. *Brown*, 119 Cal. 283 (51 Pac. Rep. 2; 63 Am. St. Rep. 108). The court say: "It may be that, in those jurisdictions where an action is given on the debt as well as on the security, the mortgagee may release regardless of the mortgagor's rights, or may proceed regardless of the security; but in this state the law gives him but one action, and he should be confined to that, at least to the extent of requiring him first to exhaust his security before obtaining other relief. If he desires to release a part of his security, and still hold the mortgagee for any deficiency after foreclosure, he must obtain the mortgagor's consent, or see to it that in releasing he is paid full value, and gives the mortgagor credit therefor." Neb. Code Civ. Proc., § 347, applied—jurisdiction of district court to enter personal judgment for deficiency in an action to foreclose a land contract as a mortgage. *Kloke* v. *Gardels*, 52 Neb. 117 (71 N. W. Rep. 955).

Sec. 627. Allowance of attorney's fees in foreclosure proceedings. In Louisiana it is held that a stipulation that an attorney's fee shall be due in case the note after maturity is put into the hands of an attorney, is valid. *Hansen* v. *Their Creditors*, 49 La. 1731 (22 So. Rep. 923). Where a statute makes it the duty of a state officer who receives a salary from the public funds to prosecute foreclosure suits for the state, it cannot claim an allowance for attorney fees. *State* v. *Fitzpatrick*, Idaho (51 Pac. Rep. 112). Where a mortgage provides for the allowance of a certain per cent. as

attorney fees, it is proper to include such sum in a decree as a part of the obligation secured by the mortgage. *O'Neal* v. *Hart*, 116 Cal. 69 (47 Pac. Rep. 926). Where the holder of a senior trust deed voluntarily becomes a party to an action to foreclose a junior trust deed, and files a cross complaint to foreclose his deed, it is proper to allow him a reasonable solicitor's fee. *Shaffner* v. *Appleman*, 170 Ill. 281 (48 N. E. Rep. 978). To stop a pending foreclosure of a mortgage providing for the payment of a reasonable solicitor's fee, the tender must include a reasonable allowance for solicitor's services rendered up to the time it is made. *Oakford* v. *Brown* 167 Ill. 293 (47 N. E. Rep. 202). Although a mortgage provides for the allowance of attorney's fees in case of foreclosure, it is held to be error to include such fees in a decree of foreclosure where the mortgage does not purport to be given to secure their payment. *Irvine* v. *Perry*, 119 Cal. 352 (51 Pac. Rep. 544). But a personal judgment may be given for attorney fees stipulated for in a mortgage note, although the mortgage does not secure their payment. The stipulation for attorney's fees in case of a suit is valid. *Mason* v. *Luce*, 116 Cal. 232 (48 Pac. Rep. 72). A provision in a mortgage for the allowance of an attorney fee in case it "should be foreclosed by an action in court," is held to entitle the mortgagee to such fee, where, on account of an action by the mortgagor against him, he is compelled to ask a foreclosure of his mortgage by cross bill. *Building & Loan Ass'n* v. *Griffin*, 90 Tex. 480 (39 S. W. Rep. 656). In Louisiana it is held that attorney's fees, stipulated in a mortgage to be paid in case of nonpayment of the debt at maturity, are due when the mortgagee is bound to employ counsel to collect his claim and such counsel represents him in succession proceedings. *Zeigler* v. *His Creditors*, 49 La. 144 (21 So. Rep. 666). Where a mortgage stipulates that "the mortgagee may foreclose the mortgage and may include in such foreclosure a reasonable counsel fee, to be fixed by the court," the duty of determining the amount to be allowed as attorney's fees devolves upon the court, and the fact that it appears from the records that a certain attorney brought the action and tried it, is sufficient evidence of his employment. *Woodward* v. *Brown*, 119 Cal. 283 (51 Pac. Rep. 2; 63 Am. St. Rep. 108). Where a mort-

gage placed with a firm of attorneys for foreclosure, provided for the payment of all "attorneys' commissions incurred in the collection of it," and for the application of the proceeds of sale to the payment "of all expenses incident to the sale including compensation to the person making the sale," was afterwards assigned by the mortgagee to one member of such firm for the purpose of making the sale, it is held that the firm was entitled to a separate collection commission in addition to the compensation allowable to the partner for making the sale. *Gaither* v. *Tolson*, 84 Md. 637 (36 Atl. Rep. 449). For particular cases as to allowance of attorney's fees, see *Grunewald* v. *Commercial Soap, Starch & Candle Mf'y*, 49 La. 489 (21 So. Rep. 646); *Murray* v. *Chamberlain*, 67 Minn. 12 (69 N. W. Rep. 474).

Attorney's fees, stipulated for in a mortgage, may be allowed as costs under Wis. Rev. Stat., § 2918, providing that "in all equitable actions costs may be allowed or not to any party, in the discretion of the court." *Spengler* v. *Hahn*, 95 Wis. 472 (70 N. W. Rep. 466). Applying Cal. Code Civ. Proc., §§ 580, 1021, it is held that attorney's fees cannot be recovered as a part of the "costs of the suit," although a provision in the mortgage provides for retaining out of the proceeds of foreclosure "all costs and charges of suit including counsel fees," nor will they be allowed where their allowance is not demanded in the complaint. *Brooks* v. *Forington*, 117 Cal. 219 (48 Pac. Rep. 1078). Construing Utah Laws 1894, ch. 89, p. 25, providing that when an attorney or counsel fee is claimed by the plaintiff, no greater amount should be allowed or decreed than the sum which appears by the evidence to be actually charged by and paid to the attorney for the plaintiff, and that only the amount to be retained by the attorney shall be decreed, it is held that no attorney fee can be allowed in a decree foreclosing a trust deed, where there is no proof showing what the attorney for the plaintiffs actually charged or what the agreement was he should receive from the plaintiffs. *McClure* v. *Little*, 15 Utah 379 (49 Pac. Rep. 298; 62 Am. St. Rep. 988). Me. Laws 1899, p. 88, provides for the allowance of an attorney's fee upon the foreclosure of a mortgage under Rev. Stat., ch. 90, § 5.

Sec. 628. Appointment of receiver in foreclosure proceedings. A receiver will not be appointed pending foreclosure, where the mortgaged property is in the possession of a solvent person who purchased it at a sale under a judgment against the mortgagor. *Warren* v. *Pitts*, 114 Ala. 65 (21 So. Rep. 494). A receiver appointed in an action pending to foreclose a trust deed should not be discharged where it appears that the property involved is all the property owned by the defendant, is subject to prior liens, and will not be sufficient to satisfy the plaintiff's claim. *Pearson* v. *Kendrick*, 74 Miss. 285 (21 So. Rep. 87). In California an ordinary real estate mortgage does not embrace growing crops and they can only be mortgaged as provided by Civ.Code, § 2955, *et seq.*, hence, where a mortgage provided for the appointment of a receiver to collect the rents and profits, it is held that a receiver appointed in an action to foreclose such mortgage is only entitled to so much of the growing crop as was reserved for rent. *Scott* v. *Hotchkiss*, 115 Cal. 89 (47 Pac. Rep. 45). Particular facts held to authorize the appointment of a receiver and application of rents to the payment of the mortgage indebtedness. *Stetson* v. *Northern Inv. Co.*, 101 Ia. 435 (70 N. W. Rep. 595). Where a receiver has been appointed in an action to foreclose a mortgage to collect the rents of the mortgaged premises and apply them in payment of delinquent taxes and interest due on a prior mortgage, it is no ground for his discharge that the holder of the first mortgage had paid the delinquent taxes, added the sum to the amount due on his mortgage, foreclosed, and bid in the property for the full amount due, as such proceedings do not adjust the rights of the prior mortgagee and the holders of other liens. *Farmers' Nat. Bank* v. *Backus*, 67 Minn. 48 (69 N. W. Rep. 638).

Sec. 629. Counterclaims and cross bills in foreclosure proceedings. Where a mortgagor gave his note and mortgage for $30,000 and took from his mortgagee an agreement to advance to him money to that amount, he may maintain a cross complaint for any deficiency due him on such contract, where the mortgagee seeks to foreclose without having advanced the entire sum. *Savings Bank* v. *Asbury*, 117 Cal. 96 (48 Pac. Rep. 1081). A subsequent grantee, against

whom the foreclosure of a mortgage is sought, his grantor being made a party, may file a cross complaint setting up the latter's covenant against incumbrances, and by offering to pay the amount ascertained by the court to be due on the mortgage and the costs of foreclosure, have a judgment against the grantor for such amount. *Duroe* v. *Stephens*, 101 Ia. 358 (70 N. W. Rep. 610). This case is supported by *Kuhnen* v. *Parker*, 56 N. J. Eq. 286 (38 Atl. Rep. 641). In an action for the offset of damages by a mortgage debtor against his creditor for the premature institution of a foreclosure suit, and for refusal to release parts of the property from the mortgage lien, where the mortgage contract, together with other collateral and contemporaneous written agreements, are plain and unambiguous in their terms, it is error to instruct that the jury may take into account what was "contemplated" or "expected" by the parties as to the way and means by which the debtor was to realize money with which to discharge the mortgage debt. *Carbondale Inv. Co.* v. *Burdick*, 58 Kan. 517 (50 Pac. Rep. 442).

Sec. 630. Adjudication of adverse claims of third parties in foreclosure proceedings. An adverse claim of title by a third party will not be determined in an equitable proceeding to foreclose a mortgage. *Waughop* v. *Bartlett*, 165 Ill. 124 (46 N. E. Rep. 197). It is not the object of a foreclosure suit to try a title alleged to be paramount to that of the mortgagor. *Gilchrist* v. *Foxen*, 95 Wis. 428 (70 N. W. Rep. 585); *Kizer* v. *Caufield*, 17 Wash. 417 (49 Pac. Rep. 1064). Citing, *Cody* v. *Bean*, 93 Cal. 578 (29 Pac. Rep. 228). Where a defendant claims an adverse title, prior and paramount to that of the mortgagor, a judgment barring and foreclosing the defendants of all right and claim in the mortgaged premises, except the right to redeem, is erroneous. *McLaughlin* v. *Betcher*, 70 Minn. 71 (72 N. W. Rep. 827; 73 N. W. Rep. 1). A plaintiff in an action to foreclose a mortgage is entitled to the trial of an issue raised as to whether the title to the premises asserted by a defendant other than the mortgagor was acquired prior or subsequent to the execution of the mortgage. *Johnson* v. *Irwin*, 16 Wash. 652 (48 Pac. Rep. 345). Upon foreclosure of a deed of trust against an

insolvent corporation for which a receiver has been appointed, the court may determine priorities between the general creditors where it has custody of all the property and all the parties are before the court. *State* v. *Superior Court*, 17 Wash. 380 (49 Pac. Rep. 507). Upon foreclosure of a mortgage executed by the mortgagor before his marriage, against his widow and the devisee of the fee, the widow is entitled to have the amount of the debt to be borne by her interest in the estate determined, and the premises sold, subject to the dower, to pay the amount fixed as belonging to the devisee to pay, and the widow's right to be sold to pay the other portion. *Merselis* v. *Van Riper*, 55 N. J. Eq. 618 (38 Atl. Rep. 196).

Sec. 631. Foreclosure against deceased mortgagor —Filing claim against estate. Construing Ill. Rev. Stat. ch. 3, § 70, relating to the administration of the estates of deceased persons, and which provides that "all demands not exhibited within two years, as aforesaid, shall be forever barred, unless the creditors shall find other estate of the deceased, not inventoried or accounted for by the executor or administrator, in which case their claims shall be paid *pro rata* out of such subsequently discovered estate," it is held that a mortgagee who fails to file his note against the estate of his deceased mortgagor for two years, does not lose his right to foreclose his mortgage, although the mortgaged property has been inventoried, but he is barred from recovering any personal judgment for his deficiency. *Waughop* v. *Bartlett*, 165 Ill. 124 (46 N. E. Rep. 197). A petition to foreclose a mortgage and for personal judgment against decedent, is sufficient where it alleges the presentation of a claim against the estate as required by Mont. Code Civ. Proc. 1895, §§ 2603, 2604, without alleging that the claim was supported by the statutory affidavit, or stating the action taken by the administrator. *Jones* v. *Rich*, 20 Mont. 289 (50 Pac. Rep. 936). Mills' Ann. Colo. Stat., § 4783, construed and applied—filing an allowance of claim as a condition precedent to foreclosure. *Townsend* v. *Thompson*, 24 Colo. 411 (51 Pac. Rep. 433).

Sec. 632. Rights of prior incumbrancers. Where a mortgagor surrenders possession of mortgaged premises to a

mortgagee on account of a default in the conditions of the mortgage, the latter is given distinctly different and additional security for his debt; and if the mortgagee forecloses his mortgage while thus in possession, and the property sells for less than the amount due, he is, as against a subsequent mortgagee, entitled to continue in possession during such part of the year of redemption as may be necessary to satisfy the unpaid balance of his debt. *Longfellow* v. *Fisher*, 69 Minn. 307 (72 N. W. Rep. 118). Where, upon review of a decree foreclosing a senior mortgage, it is held void as to a junior mortgagee and valid as to the mortgagors, the senior mortgagee is precluded from asserting any interest in the property as against the junior mortgagee. *Tate* v. *Hamlin*, 149 Ind. 107 (47 N. E. Rep. 5).

Sec. 633. Rights of junior incumbrancers. The only right of a junior mortgagee who has not been made a party to the foreclosure of a prior mortgage is to redeem the property from that mortgage. *Gault* v. *Equitable Trust Co.*, 100 Ky. 578 (38 S. W. Rep. 1065). The failure of a junior mortgagee to enforce a lien when made a party to an action to foreclose a senior mortgage does not affect his rights against endorsers of his mortgage note. *Carver* v. *Steele*, 116 Cal. 116 (47 Pac. Rep. 1007; 58 Am. St. Rep. 156). The holder of a second mortgage which was foreclosed first may recover from the first mortgagee taxes paid after the foreclosure and before the expiration of the right to redeem, but he cannot recover taxes paid after the expiration of the right to redeem. His right to recover in the first case is not affected by the fact that he paid the taxes before they were delinquent. *Farrell* v. *Gustin*, 18 Wash. 289 (51 Pac. Rep. 372).

Sec. 634. Marshalling securities. Where a mortgage debt is to be apportioned between several pieces of land, the proportion which each should pay must be determined on the basis of their relative value. *Skinner* v. *Harker*, 23 Colo. 333 (48 Pac. Rep. 648). Where a mortgage to secure the husband's debt embraces his land and also land of his wife, his land should be first sold in exoneration of his wife's land. *Shew* v. *Call*, 119 N. C. 440 (26 S. E. Rep. 33; 56 Am. St.

Rep. 678). The right of a second mortgagee to have the assets and securities marshalled so that a preceding mortgagee may be required to look first to the lands on which the second mortgage is not a lien is absolute against the mortgagor, and against his voluntary fraudulent grantee of the lands on which the second mortgage is not a lien. The purchaser at a foreclosure sale under a second mortgage receives the title which the mortgagor had at the time of the delivery of that mortgage, and, attendant upon that title, he takes the right which the second mortgagee received to have the assets marshalled, and and he may assert this equity against the subsequent voluntary and fraudulent grantee of the mortgagor. *Whittaker* v. *Belvidere Roller-Mill Co.*, 55 N. J. Eq. 674 (38 Atl. Rep. 289). The doctrine of marshalling assets will not be applied against a primary creditor who permits an appropriation of property embraced in his secondary security, which injuriously affects a subsequent judgment creditor of whose judgment he had no actual notice, and the constructive notice arising from the recording of the judgment is not sufficient to have that effect. *Annan* v. *Hays*, 85 Md.505 (37Atl.Rep. 20). This principal is supported by *Merchantville Bldg. & L. Ass'n* v. *Zane*, N. J. Eq. (38Atl. Rep. 420). The rules for marshalling securities will not be applied against a prior mortgagee, unless it is made to appear that he will not thereby be delayed or inconvenienced in the collection of his debt. *Farwell* v. *Bigelow*, 112 Mich. 285 (70 N. W. Rep. 579). Particular evidence held insufficient to show such probable delay or inconvenience as will prevent the application of the rule for marshalling securities. *Norfolk State Bank* v. *Schwenk*, 51 Neb. 146 (70 N. W. Rep. 970). For particular fact case concerning marshalling assets, see *Wayne International B. & L. Ass'n* v. *Moats*, 149 Ind. 128 (48 N. E. Rep. 793). The statute of Illinois (3 Starr & C. Ann. Stat., p. 611), declaring that, where a release of a homestead shall be by way of mortgage or security including different pieces of land, the creditor, in enforcing his security must sell the other land first, is held not to apply where the mortgaged lands were not a homestead at the time of the giving of the mortgage, or where the mortgage is given for the purchase price of the homestead. *Gaither* v. *Wilson*, 164 Ill. 544 (46 N. E. Rep. 58).

Sec. 635. Marshalling securities—Rule where portions of the mortgaged land have been conveyed. Where a mortgagor in a recorded mortgage which provided that upon the sale of any portion of the premises the mortgagee shall release the same from the mortgage upon the payment of the purchase money to him, sold a portion of the premises and reserved a lien to secure the purchase money notes which he delivered to the mortgagee, it is held the rule requiring alienated premises to be subjected to foreclosure in the inverse order of sale by the mortgagor does not apply, but that foreclosure should be first had on the land so sold for the amount due on the notes. *Northwestern Land Ass'n* v. *Robinson*, 114 Ala. 468 (21 So. Rep. 999). A grantee claiming the benefit of the priority of his conveyance has the burden of establishing such priority. *Woodward* v. *Brown*, 119 Cal. 283 (51 Pac. Rep. 2; 63 Am. St. Rep. 108). In the case of *Ellis* v. *Fairbanks*, 38 Fla. 257 (21 So. Rep. 107), the supreme court of Florida say: "It is a familiar doctrine, and sustained by many authorities, that where lands are mortgaged to secure a debt, and a part of said lands are subsequently sold and conveyed by the mortgagor, the portion unsold is primarily liable under the mortgage. A release subsequently given by the mortgagee, without the assent of the purchaser of the part sold, to the mortgagor of the portion unsold, will not prejudice the rights of such purchaser if the mortgagee gave such release with notice or knowledge of the rights and equities of the purchaser. If the part released is sufficient to satisfy the entire debt, the mortgagee cannot resort to the part which has been sold, *Gaskill* v. *Sine*, 13 N. J. Eq. 400 (78 Am. Dec. 105), and authorities cited therein; but such release operates as a discharge of the lien to the extent of the value of the land released, *Hoy* v. *Bramhall*, 19 N. J. Eq. 563 (97 Am. Dec. 687); *Cogswell* v. *Stout*, 32 N. J. Eq. 240, and authorities cited; *Insurance Co.* v. *Huder*, 85 Ala. 713." The principles above annunciated are supported by *Union Nat. Bank of Oshkosh* v. *Milburn & Stoddard Co.*, 7 N. Dak. 201 (73 N.W. Rep. 527). Applying Cal. Civ. Code, §§ 2899, 3433, it is held that where portions of the mortgaged premises have been sold, upon foreclosure, they should be offered for sale in the inverse order of their alienation; and the right of a mortgagee

to resort to property so conveyed is not affected by his subsequent release of other portions of the mortgaged property made without knowledge of such conveyances. *Woodward* v. *Brown*, 119 Cal. 283 (51 Pac. Rep. 2; 63 Am. St. Rep. 108). Cal. Civ. Code, § 2899, construed and applied—sale of mortgaged lots—sale in inverse order of alienation in case of foreclosure. *Irvine* v. *Perry*, 119 Cal. 852 (51 Pac. Rep. 544).

Sec. 636. Sale under decree of foreclosure. Where an adjournment of a sale is made necessary by an injunction against it, no one being present, the officer is not required to make public announcement of the adjournment. *Marcus* v. *Collamore*, 168 Mass. 56 (46 N. E. Rep. 432). A deputy sheriff may act for his principal in matters pertaining to foreclosure sales. *Hamer* v. *McKinley-Lanning L. & T. Co.*, 52 Neb. 705 (72 N. W. Rep. 1041). In Nebraska it is held that a decree of foreclosure is sufficient authority in itself for its execution. No order of sale need issue and if one be issued, a sale made thereunder will not be set aside for formal defects in the order, or for failure of the officer to follow entirely the command of the order provided he follow the law and the decree. *Johnston* v. *Colby*, 52 Neb. 827 (72 N. W. Rep. 813). A statute (Ark. Const., art. 17, § 11), providing that the rolling stock and all other movable property belonging to a railroad company shall be treated as personal property, does not prohibit the sale as an entirety of all the property of a railroad company, both real and personal, upon foreclosure of a deed of trust covering all its property, where it does not appear that such sale would prejudice the interests of any one. *Southwestern Arkansas & I. T. Ry. Co.* v. *Hays*, 63 Ark. 315 (38 S. W. Rep. 665). Wash. Laws 1897, ch. 50, pp. 70–76, providing for the stay of the sale of lands under foreclosure decree for one year from the date of the decree, and that they shall bring 80 per cent. of the appraised value when sold, is unconstitutional as to mortgages executed before its passage. *Swineburne* v. *Mills*, 17 Wash. 611 (50 Pac. Rep. 489; 61 Am. St. Rep. 932). See opinion for exhaustive review of authorities upon this subject. Wash. Laws 1897, ch. 50; Code Proc., § 630, applied—previous levy by officer making sale. *State* v. *Moyer*, 17 Wash. 643 (50 Pac. Rep. 492).

Sec. 637. Appraisement of property and notice of foreclosure sale. An objection that the appraisement was too low comes too late when not made until after the sale. *Scottish-American Mort. Co.* v. *Bigsby*, 52 Neb. 104 (71 N. W. Rep. 961). An appraisement is not so defective as to invalidate the sale where it finds the value of each of several tracts, and the incumbrances on each, separately, but concludes by stating defendants' interest in gross. Nor will a sale be set aside, on motion of the mortgagor, because no certificates of incumbrances were procured, when the incumbrances found and deducted were less than those actually existing. *Johnston* v. *Colby*, 52 Neb. 827 (72 N. W. Rep. 818). Applying the statutes of Nebraska it is held that when a decree of foreclosure directs that a sale shall be made by the sheriff, his deputy may act for him in appraising the property. *Nebraska Loan & Bldg. Ass'n* v. *Marshall*, 51 Neb. 584 (71 N. W. Rep. 68); *Johnson* v. *Colby*, 52 Neb. 827 (72 N. W. Rep. 818). Neb. Comp. Stat., ch. 1, tit. 14; Code Civ. Proc., § 491d, applied—deposit of copy of appraisement in the office of the clerk of the court. *Walker* v. *Patch*, 52 Neb. 768 (73 N. W. Rep. 228).

Notice of a sale to be made after there has been an adjournment need not be advertised as fully as the original notice. *Marcus* v. *Collamore*, 168 Mass. 56 (46 N. E. Rep. 432). Ill. Rev. Stat., ch. 95, § 14, providing that in all sales of real estate under mortgage thirty days previous notice of such intended sale shall be given in the county or counties where the premises are situated and no sale shall be made except in the county in which the premises are situated, is held not to apply to the sale of a line of railroad with its equipments, franchises, etc. *Craft* v. *Indianapolis D. & W. Ry. Co.*, 166 Ill. 580 (46 N. E. Rep. 1132). Where a decree described the property as the "S. E. quarter of section 24, in township 12 N., range 15 W., of the 6th P. M., in Buffalo county," and the description was the same in the notice of sale, except the description read "in township 12" without showing whether the township was the north or south, it is held that there was no variance in the description between the decree and the notice. *Nebraska Land Stock-Growing & Inv. Co.* v. *McKinley-Lanning Loan & T. Co.*, 51 Neb. 647

(71 N. W. Rep. 812); *Hamer* v. *McKinley-Lanning L. & T. Co.*, 52 Neb. 705 (72 N. W. Rep. 1041). Particular case in which the want of notice is held sufficient ground for setting aside a sale. *Brewer* v. *Landis*, 111 Mich. 217 (69 N. W. Rep. 498).

Sec. 638. Application of proceeds of foreclosure sale. A surplus arising from the sale of the equity of redemption by a second mortgagee belongs to the mortgagor in the absence of junior liens. *Bobbitt* v. *Stanton*, 120 N. C. 253 (26 S. E. Rep. 817). A mortgagee who bids more than the amount due, including expense of sale, must answer for the surplus whether the property is really worth more or less than the amount due or the sum bid. *Babcock* v. *American Sav. & L. Ass'n*, 67 Minn. 151 (69 N. W. Rep. 718). Where the holder of two mortgages upon the same land procured separate decrees of foreclosure, purchased at a sale under the junior mortgage, and subsequently had a sale under the senior mortgage at which he purchased for a sum larger than the amount due on such mortgage, it is held that the surplus should be applied to discharging his junior mortgage, and not be paid over to the mortgagor. Ind. Rev. Stat. 1894, § 1118, applied. *State* v. *Clapp*, 147 Ind. 244 (46 N. E. Rep. 538; 62 Am. St. Rep. 415). Where one having a vendor's lien upon an undivided one-half interest in a certain tract of land, joins in the execution of a mortgage on it, upon foreclosure of such mortgage he is entitled to only one-half of the surplus remaining after the satisfaction of the mortgage debt and costs. *Starr* v. *Searcy*, Ky. (38 S. W. Rep. 504). Upon foreclosure, after her death, of a mortgage upon a wife's land to secure her husband's debt, his interest in the land, if not exceeding the amount of the mortgage, should be applied to its payment and the entire surplus should be awarded to her heirs. *Shields* v. *Yellman*, 100 Ky. 655 (39 S. W. Rep. 30).

Sec. 639. Validity of foreclosure sale and sheriff's deed—Setting aside—Resale. A purchase by an executor or administrator on foreclosure of a mortgage due the estate, is not absolutely void as against the whole world, whether the purchase be in his individual name or as executor or adminis-

trator. *Phillips* v. *Love*, 57 Kan. 828 (48 Pac. Rep. 142). A sheriff's sale and deed founded upon a mortgage foreclosure judgment which had been previously paid, is a nullity in the hands of a judgment creditor as purchaser; and the recording of such deed does not start the running of the statute of limitations in his favor. *Corby* v. *Moran*, 58 Kan. 278 (49 Pac. Rep. 82). A sheriff's deed founded upon a mortgage foreclosure judgment is not void upon its face unless defects sufficient to invalidate it appear in the instrument itself; and a misrecital by it of the date of the judgment upon which it is founded, which is manifestly a clerical error, and a misdescription of the land ordered to be sold, where it is manifest that the tract conveyed is a portion of the one so ordered to be sold, and a misstatement of the capacity in which plaintiff recovered judgment, as administratrix instead of in her own right, do not render such deed inadmissible in evidence; and an instruction to the jury to find against the party claiming under it because of such misrecital, misdescription, and misstatement is error. *Corby* v. *Moran*, 58 Kan. 278 (49 Pac. Rep. 82). After acquiescing in the sale for more than 20 years, a mortgagor who has consented to the sale of the mortgaged premises by a trustee appointed by a court of equity, cannot assail the validity of such a sale because the docket of the court does not show that any statement of the mortgagee's claim was filed either before or after the sale. *Connaughton* v. *Bernard*, 84 Md. 577 (36 Atl. Rep. 265). Where a sale of land under a decree of foreclosure is made by a trustee, whether or not it shall be sold in parcels or as an entirety rests in his sound discretion and where the evidence is conflicting his decision will not be overruled. *Hughes* v. *Riggs*, 84 Md. 502 (36 Atl. Rep. 269). Objection to a sale that several parcels of land were sold together which should have been offered separately, must be made within a reasonable time or relief on account thereof will be denied upon the ground of laches. *Thompson* v. *Browne*, 10 S. Dak. 344 (73 N. W. Rep. 194). Citing, *Trust Co.* v. *Bradley*, 9 S. Dak. 495 (70 N. W. Rep. 648); *Marcotte* v. *Hartman*, 46 Minn. 202 (48 N. W. Rep. 767); *Vigoureux* v. *Murphy*, 54 Cal. 346; *Love* v. *Cherry*, 24 Ia. 204; *Cunningham* v. *Cassidy*, 7 Abb. Prac. 183; *Roberts* v. *Fleming*, 53 Ill. 196. Where a foreclosure sale, invalid

on account of the negligence or misconduct of the mortgagee in making it, is set aside by the mortgagor and he is given an opportunity to redeem which he fails to exercise, he cannot afterwards maintain an action for damages against the mortgagee on account of his misconduct in making such sale. *Dennett* v. *Codman*, 168 Mass. 428 (47 N. E. Rep. 131). It is not a valid ground for setting aside a sale of lands, made subject to one prior incumbrance, that an action is pending in which a third party seeks to foreclose another mortgage, and to have the same declared a first lien on the property; the judgment under which the sale is made being clear and explicit in its terms as to what should be sold. *Geuda Springs Town & Water Co.* v. *Lombard*, 57 Kan. 625 (47 Pac. Rep. 532). It is not error for a court to refuse to set aside a sale made upon the foreclosure of a first mortgage, upon the request of the second mortgagee, for the reason that he had no notice of the sale, where it appears that such second mortgagee advised the plaintiff who became the purchaser that he did not desire to purchase at the sale and the plaintiff did not know that an attorney who requested notice of the sale was acting for such second mortgagee. *Homestead Land Co.* v. *Joseph Schlitz Brewing Co.*, 94 Wis. 600 (69 N. W. Rep. 846). Where a party at whose instance a foreclosure sale of real estate has been set aside, fully complies with the terms imposed by the court as conditions to setting aside the sale, it is error to enjoin a resale of the property under the judgment merely because the officer to whom the purchaser paid the amount of his bid has made an unauthorized application of a portion of the money to the payment of taxes and costs and refuses for that reason to pay to the purchaser the whole sum paid on demand. *Chapin* v. *Pyle*, 58 Kan. 566 (50 Pac. Rep. 499).

Sec. 640. **Confirmation of foreclosure sale.** An order duly made confirming a foreclosure sale is an adjudication of the regularity of the proceedings of the officer making the sale and cannot be attacked in an independent action on the ground of mere inadequacy of the price for which the property sold. *Phillips* v. *Love*, 57 Kan. 828 (48 Pac. Rep. 142). A purchaser of real estate at foreclosure sale becomes a *quasi* party to the action so far as the proceedings confirming the sale are

concerned and may appeal from orders affecting his right to such confirmation. He is entitled to notice of an appeal from an order confirming the sale, under Wis. Rev. Stat., § 3049. *Rogers* v. *Shove*, 98 Wis. 271 (73 N. W. Rep. 989). The owner of the equity of redemption of real estate sold under mortgage foreclosure cannot be heard to object to the confirmation of the sale, because prior liens existing against the real estate were not deducted from the appraisement thereof. *Nebraska Land Stock-Growing & Inv. Co.* v. *McKinley-Lanning Loan & T. Co.*, 51 Neb. 647 (71 N. W. Rep. 312). Confirmation of a foreclosure sale of hotel property will not be denied because a prospective bidder was refused the privilege of inspecting the premises by the sheriff's watchman until the sheriff should arrive, it not appearing that the request was renewed to the sheriff or that he refused to allow such inspection; nor will such confirmation be denied because the hotel and the personal property contained in it were both sold together, both having been included in the same mortgage and there being no separate liens on the personal property. *Worth* v. *Newlin*, N. J. Eq. (36 Atl. Rep. 30). Particular case in which confirmation was not denied on the ground that a copy of the appraisement had not been filed before the sale was advertised. *Nebraska Loan & T. Co.* v. *Barnes*, 50 Neb. 324 (69 N. W. Rep. 761). Particular objections to confirmation held insufficient. *Scottish-American Mort. Co.* v. *Bigsby*, 52 Neb. 104 (71 N. W. Rep. 961). Ky. Stat., § 521, applied—title of mortgagor after confirmation of sale. *Johnson's Admr.* v. *Haskins*, Ky. (38 S. W. Rep. 687).

Sec. 641. Title of purchaser at foreclosure sale. A purchaser at a foreclosure sale had under a void mortgage does not acquire any title. *Marks* v. *Wilson*, 115 Ala. 561 (22 So. Rep. 134). The title of a purchaser is not affected by usury in the mortgage, where he purchased without notice of it. *Hoots* v. *Williams*, 116 Ala. 372 (22 So. Rep. 497). A purchaser at a foreclosure sale had under a mortgage describing the land by boundaries, acquires title to the entire tract though it contains more than the number of acres specified in the mortgage. *Skaggs* v. *Kelly*, Tenn. (42 S. W. Rep. 275). The purchaser takes subject to the reservations and con-

ditions contained in the deed, through which the mortgagor acquired his title. Wis. Rev. Stat., § 8169, applied. *Gilchrist* v. *Foxen*, 95 Wis. 428 (70 N. W. Rep. 585). A purchaser at a foreclosure sale, had under a decree foreclosing a mortgage executed by the mortgagor, while the land was in the adverse possession of another who was not made a party to the proceedings to foreclose, acquires no title as against such adverse claimant. *Probst* v. *Bush*, 115 Ala.495 (22 So. Rep. 445). A purchaser whose deed and the mortgage and decree under which the sale was made, describes the property generally as all the property owned by the mortgagor, acquires no title as against a purchaser from the mortgagor of specifically described property, and the fact that the mortgagor was a railroad company makes no difference where the property in dispute was not owned for railroad purposes. Wash. Code Proc., § 500, applied. *National Bank of Commerce* v. *Lock*, 17 Wash. 528 (50 Pac. Rep. 478; 61 Am. St. Rep. 928.)

Sec. 642. Right of purchaser at foreclosure sale to possession—Writ of assistance. The right of a purchaser at foreclosure sale to recover possession by summary process, under Mass. Pub. Stat.,ch. 175, § 1, may be exercised by his grantee against a tenant of the mortgagor. *Allen* v. *Chapman*, 168 Mass. 442 (47 N. E. Rep. 124). A writ of assistance is proper to place the mortgagee, who has purchased under a foreclosure sale, in possession under his deed. It runs against the mortgagor and all persons who have purchased the fee under him, *pendente lite*, with notice. *Hibernia Sav. & L. Soc.* v. *Lewis*, 117 Cal. 577 (47 Pac. Rep. 602). A purchaser is entitled to a writ of assistance against the mortgagor's widow, who, as administratrix, was a party to the action to foreclose, where she does not claim any rights in the premises independent of the deceased. *Finger* v. *McCaughey*, 119 Cal. 59 (51 Pac. Rep. 13). Construing and applying Hill's Wash. Code. Vol. 2, §§ 508, 519, it is held that a purchaser at a foreclosure sale, becomes entitled to the possession of the premises sold from the time of the acceptance of his bid by the sheriff. *State* v. *Northwestern & P. H. Bank*, 18 Wash. 118 (50 Pac. Rep. 1023). A purchaser at a foreclosure sale is not entitled to a writ of assistance to place him in posses-

sion, as against one who was not a party to the foreclosure suit and who was in possession under claim of right before the commencement of such suit; and the validity of such claimant's title cannot properly be tested or determined on an application for such writ. *Ex parte Jenkins*, 48 S. C. 325 (26 S. E. Rep. 686).

Sec. 643. Foreclosure by advertisement. Applying S. Dak. Comp. Laws, § 5411, providing that every mortgage of real property containing a power of sale, upon default in the condition of such mortgage, may be foreclosed, it is held that a foreclosure by advertisement may be had of a mortgage which recites, "It is further agreed that this mortgage or trust deed may be foreclosed by action or by advertisement, as provided by chapter 28 of the Code of Civil Procedure of the Compiled Laws of Dakota 1887, and this paragraph shall be deemed as authorizing and constituting a power of sale as provided in this chapter." *Male* v. *Longstaff*, 9 S. Dak. 389 (69 N. W. Rep. 577). Where the power of sale omits the essential words "in case of nonpayment" of the debt, a foreclosure by advertisement is invalid, but a purchaser thereunder acquires the rights of the mortgagee. *Lariverre* v. *Rains*, 112 Mich. 276 (70 N. W. Rep. 583). An assignee, for the benefit of creditors, may foreclose by advertisement a mortgage containing a power of sale executed and delivered to his assignor and become a good faith purchaser at such sale, under S. Dak. Comp. Laws, § 5419, providing that "the mortgagee, his assigns or other legal representatives may fairly and in good faith purchase the premises so advertised or any part thereof, at such sale." *Thompson* v. *Browne*, 10 S. Dak. 344 (73 N. W. Rep. 194). Where the validity of a foreclosure by advertisement is conceded, and the only question is the right of the mortgagee to deduct sums paid for taxes and insurance, it is held, construing and applying Minn. Gen. Stat. 1894, § 6033, requiring a notice of foreclosure by advertisement to specify "the amount claimed to be due thereon, and taxes, if any, paid by the mortgagee at the date of the notice," that the mortgagee can deduct and retain from the proceeds of sale, the amount paid for taxes before the commencement of the publication of the notice of sale, although

the specific amount so paid is not stated in the notice and sale, but it is stated therein that the premises will be sold to pay principal and interest "and any sums paid for taxes or insurance on the premises;" but he cannot retain money paid for an insurance policy on the morning of the sale, although the insurance was previously ordered, where the insurance is to cover the year allowed for redemption. *Hamel* v. *Corbin*, 69 Minn. 223 (72 N. W. Rep. 106). A statute (S. Dak. Comp. Laws, § 5418), providing that "if the mortgaged premises consist of distinct farms, tracts, or lots, they must be sold separately," does not apply to a sale of city lots upon which an expensive building has been erected which extends to some part of each lot and is so planned that each part would be practically useless without the other. *Thompson* v. *Browne*, 10 S. Dak. 344 (73 N. W. Rep. 194). An application to vacate a foreclosure sale by advertisement, on account of inadequacy of price or failure to sell in parcels, will not be entertained, no excuse for the delay being shown, where it is made over four months after the expiration of the time allowed for redemption. *Northwestern Mortg. Trust Co.* v. *Bradley*, 9 S. Dak. 495 (70 N. W. Rep. 648).

Sec. 644. Power of sale—Sale under. The right to sell under a power of sale contained in a recorded mortgage, is not affected by the loss of the original instrument. *Bibb* v. *Crews*, 113 Ala. 617 (21 So. Rep. 341). Mere assignment of a note secured by a mortgage containing a power of sale does not transfer to the assignee the power of sale, and a sale by him under the power amounts merely to an equitable assignment of the notes and mortgage. *Hussey* v. *Hill*, 120 N. C. 312 (26 S. E. Rep. 919; 58 Am. St. Rep. 789).

It is not essential to the validity of a sale under a power that the assignee of such power be personally present at the sale. *Ray* v. *Home & Foreign Inv. & A. Co.*, 98 Ga. 122 (26 S. E. Rep. 56). Where the notice of sale falsely stated that the premises were subject to incumbrances and an out of the way place was designated for the sale, it is voidable at the choice of the mortgagor. *Long* v. *Richards*, 170 Mass. 120 (48 N. E. Rep. 1083; 64 Am. St. Rep. 281). In Massachusetts it is held that a mortgagee, when there has been no

default or breach of conditions of the mortgage, cannot sell the land mortgaged under the usual power of sale contained in the mortgage, so as to pass a good title even to a *bona fide* purchaser for value or to any subsequent purchaser from him. In case of such an unauthorized sale by the mortgagee, the mortgagor, if he so elect, can recover full damages from him whether he can or cannot redeem the premises from the purchaser, and payment of the damages operates to confirm the title of the purchaser as against such mortgagor. Allen, Holmes and Knowlton, JJ., dissenting. *Rogers* v. *Barnes*, 169 Mass. 179 (47 N. E. Rep. 602; 38 L. R. A. 145). Applying Wis. Rev. Stat., §§ 3528, 3582, 3584, it is held that where a mortgage provided that upon default it should be lawful for "said party of the second part, her heirs, executors, administrators and assigns," to sell the premises at public auction "pursuant to the statute," a sale may be made by an under sheriff upon which the sheriff may issue a certificate of sale, although the notice of foreclosure stated the sale would be by a certain person who was designated as sheriff. In such a case final deed may be properly made by the successor of the sheriff. *Morrissey* v. *Dean*, 97 Wis. 302 (72 N. W. Rep. 878). A purchaser of mortgaged premises at a sale under a power of sale in the mortgage, takes the mortgagor's title divested of all incumbrances since the creation of the power. *Mutual Loan & Banking Co.* v. *Haas*, 100 Ga. 111 (27 S. E. Rep. 980; 62 Am. St. Rep. 317).

Sec. 645. Sale under power—Purchase by mortgagee. Where a mortgage authorizes him to do so, a mortgagee may purchase at a sale made by him under a power of sale in the mortgage. *Mutual Loan & Banking Co.* v. *Haas*, 100 Ga. 111 (27 S. E. Rep. 980; 62 Am. St. Rep. 317). Where a mortgage with a power of sale is executed to the clerk of a court to secure a fine, the mortgagee cannot purchase at a sale made thereunder, by his successor, and a deed executed by the clerk after he has gone out of office conveys no title. *Shew* v. *Call*, 119 N. C. 440 (26 N. E. Rep. 33; 56 Am. St. Rep. 678.)

Sec. 646. Exhausting power of sale—Title under subsequent sale. Where a mortgage is given upon a single

tract of land to secure a debt due and payable as an entirety, and in default of payment a foreclosure is had under the power contained in the mortgage, a sale for less than the amount due exhausts the lien of the mortgage. *Loomis* v. *Clambey*, 69 Minn. 469 (72 N. W. Rep. 707; 65 Am. St. Rep. 576). Applying S. Dak. Comp. Laws, § 5418, which prohibits a separate sale, under a power contained in a mortgage, of any more tracts "than shall be necessary to satisfy the amount due on such mortgage at the date of the notice of sale, with interest and the costs and expenses allowed by law," it is held that where the mortgaged land consists of distinct tracts, a sale under the power by the mortgagee of a sufficient number to satisfy the debt, interest and costs, extinguishes the power, and the sale and purchase of additional tracts by the mortgagee does not confer any title upon him or his assignee, as against an absent mortgagor having no actual knowledge of the foreclosure. *Kirby* v. *Howie*, 9 S. Dak. 471 (70 N.W. Rep. 640). The court say: "The general rule seems to be that a purchaser under an extinguished power, though for a valuable consideration and without notice, acquires no title by virtue of a sheriff's certificate or a deed based thereon. So when a mortgagor is substantially injured by a failure to observe the statutory requirements as to the exercise of a power of sale, and enough has been realized from tracts previously sold to satisfy the balance due upon the mortgage, any further sale is a nullity, and a deed of conveyance made in pursuance thereof, even in the hands of a purchaser without notice, is invalid, at least to the extent of such unauthorized and prohibited sale. Tied. Real Prop. 864; *Wood* v. *Colvin*, 2 Hill (N. Y.) 566 (88 Am. Dec. 598); *Baker* v. *Halligan*, 75 Mo. 485; *Grover* v. *Fox*, 86 Mich. 461; *Redmond* v. *Packenham*, 66 Ill. 484; *Temple* v. *Whittier*, 117 Ill. 282 (7 N. E. Rep. 642). Consequently under the statute of this state (Comp. Laws, § 5418), if the mortgaged premises consist of distinct tracts, a sufficient number of which have been sold to satisfy the debt and costs, the power to sell thereunder ceases, and the mortgagee, being at all times charged with the amount remaining unpaid, can acquire no title to the tract thereafter exposed for sale; and his assignee of the certificate of purchase stands in no better position, as against an absent mortgagor, without actual

knowledge of the foreclosure or assignment of the certificate of sale."

Sec. 647. Deeds of trust to secure debts. A deed of trust may be foreclosed after the death of the trustee and his successor by a bill in equity, although no other trustee has been appointed. *Waughop* v. *Bartlett*, 165 Ill. 124 (46 N. E. Rep. 197). Under Mo. Rev. Stat. 1889, § 7103, a conveyance by a trustee in a trust deed is *prima facie* evidence of default in the payment of the secured debt. *Hume* v. *Hopkins*, 140 Mo. 65 (41 S. W. Rep. 784). Where a deed of trust containing a power of sale, provided that in case the trustee should fail or refuse to act the beneficiary should have power to appoint a substitute trustee, it is held that a court of equity may appoint a trustee upon the death of both the original trustee and the beneficiary; and the makers of such deed cannot resist appointment on the ground that the debt is barred by the statute of limitations, where the delay constituting the bar was caused by their wrongfully enjoining the original trustee from selling under the power. *Converse* v. *Davis*, 90 Tex. 462 (39 S. W. Rep. 277). For the construction of particular trust deed, see *International Trust Co.* v. *Upton Grove L. & Imp. Co.*, 71 Minn. 147 (73 N. W. Rep. 716).

Sec. 648. Sale under deed of trust. A demand of the amount due under a deed of trust need not necessarily precede a sale thereunder. *Jopling* v. *Walton*, 138 Mo. 485 (40 S. W. Rep. 99). Upon a purchaser's failure to complete his purchase the trustee may readvertise the property and sell it again. *McClung* v. *Missouri Trust Co.*, 137 Mo. 106 (38 S. W. Rep. 578). In Missouri it is held that a conveyance by a trustee in a deed of trust, though in breach of his trust, extinguishes his power, and when brought in question in a court of law vests the legal title in his grantee. *Hume* v. *Hopkins*, 140 Mo. 65 (41 S. W. Rep. 784). When a creditor having two deeds of trust of different priorities for different debts upon the same property enforces first the junior and then the superior lien, he should be held in making the latter sale to open up the mortgagor's redemption; at least to the

extent of giving to him a right to participate in the sale and to a voice in its conduct, and after the amount bid exceeds the amount due, such creditor cannot stop the sale by cancelling the note evidencing the debt. *Coler* v. *Barth*, 24 Colo. 31 (48 Pac. Rep. 656). After the maker and trustee of a deed of trust have been made parties to a suit to convene all liens on the land, brought under W. Va. Code, ch. 139, § 7, a sale under the trust deed cannot be made pending such action. *Parsons* v. *Snider*, 42 W. Va. 517 (26 S. E. Rep. 285). A trust deed executed to secure a given debt, payable at a specified time, upon real estate, is, under the statutes of Idaho, a mortgage, and cannot be foreclosed by notice and sale, under a power of sale in such trust deed; and such trust deed can only be foreclosed by judicial sale, pursuant to decree rendered in an action brought therefor in the proper court. Idaho Rev. Stat., §§ 3325, 3327, 3328, 3333, 3334, 3350, 3353, 3354, 4520, 4528, construed and applied. *Brown* v. *Bryan*, Idaho (51 Pac. Rep. 995). See opinion for collation of California and Montana cases on this subject. Where one who has become the owner of all the interest of a grantor in a trust deed, purchases the property at a sale thereunder, the trustee is not bound to receive in lieu of such purchaser's payment in full of his bid, his receipt for any surplus remaining after the payment of the debt secured with interest and costs, if it appears that there is a dispute as to who is entitled to such surplus. *McClung* v. *Missouri Trust Co.*, 137 Mo. 106 (38 S. W. Rep. 578). Where the power of sale provides that it be for cash, the trustee is not bound to bid off or sell to the one who makes the highest bid, unless it is for cash and *bona fide*. He must exercise his sound judgment in determining who is the proper party entitled to the deed, and he may take time for that purpose. If, through mistake, he strikes off the property to the wrong person, or to one not in a position to comply, or by subsequent investigation learns that the proper bid was not selected at the sale, he may, nevertheless, in the exercise of a wise discretion, and if it appears that substantial justice has been done and the rights of interested parties protected, select the proper person to whom, under the power by which he is acting, the sale should be made and the deed given. A creditor bidding cannot turn in his cash and note

secured merely by a subsequent mortgage on the property, where another holds security on the property intermediate the deed and mortgage. *Coler* v. *Barth*, 24 Colo. 81 (48 Pac. Rep. 656).

Sec. 649. Setting aside sale under deed of trust. A sale under a deed of trust of property worth $2,000 for $1,000, will not justify the setting aside of the sale. *Monroe* v. *Fuchtler*, 121 N. C. 101 (28 S. E. Rep. 63). The heirs of a grantor in a trust deed cannot have a sale made under a power therein, after his death, set aside, where the property brings a fair price and the proceeds of the sale are applied to the payment of the debt. *Russell* v. *Roberts*, 121 N. C. 322 (28 S. E. Rep. 406). The exercise of a discretion by a trustee as to the order of sale where several parcels of land are to be sold will not be interfered with by the courts, where he acts in good faith and without prejudice to the rights of the parties interested. *Hinton* v. *Pritchard*, 120 N. C. 1 (26 S. E. Rep. 627). Where a deed of trust expressly absolves the purchaser at a sale made thereunder from any responsibility for a wrong application of the purchase money, a deed to a purchaser at a sale under such deed of trust will not be cancelled on account of the trustees misapplication of the surplus of the purchase money. *Coler* v. *Barth*, 24 Colo. 81 (48 Pac. Rep. 656).

Where a trust deed expressly provides that the owner of the note may become the purchaser, a trustee's sale will not be set aside where the only bidder was such owner; nor will such a sale be set aside because it occurred at half past 10 o'clock when it was advertised to occurr at 10 o'clock A. M. *Lothrop* v. *Tracy*, 24 Colo. 382 (51 Pac. Rep. 486; 65 Am. St. Rep. 229). Where a trustee's sale at which the mortgagee was the purchaser, is set aside by the mortgagor on account of want of service on him, the rule that the purchaser at a void foreclosure sale becomes the assignee of the mortgage, cannot be applied so as to prevent the trustee from afterwards maintaining an action to subject the property to the payment of the mortgage. *Jennings* v. *Parr*, 51 S. C. 191 (28 S. E. Rep. 82). Where an auctioneer at a sale under a deed of trust, without the knowledge of the trustee acts as agent for

the purchaser of the land,the sale is not void but only voidable and will not be set aside upon the application of persons interested unless they are able to place the purchaser in *statu quo*. *Russell* v. *Roberts*, 121 N. C. 822 (28 S. E. Rep. 406). The fact that a trustee in a deed of trust is an employe of the *cestui que trust*, does not create a fiduciary relation between the maker of the deed and the *cestui que trust*, and the trustee may make a sale under the deed at which the *cestui que trust* may be a purchaser. *Monroe* v. *Fuchtler*, 121 N. C. 101 (28 S. E. Rep. 63). A sale under a deed of trust at which the beneficiary, becomes the purchaser will not be set aside on account of the trustee occupying the relation of agent to such beneficiary, where the fact of that relationship was recognized at the time of the execution of the trust and a stipulation was inserted that it should not invalidate the sale. *Lipscomb* v. *New York Life Ins. Co.*, 138 Mo. 17 (39 S. W. Rep. 465).

Sec. 650. Indemnity mortgages. A mortgage given to secure the guarantor of a mortgagor's note is not void for want of consideration, although given after the debt accrued without new consideration, and given before the surety paid the debt. *Steen* v. *Stretch*, 50 Neb. 572 (70 N. W. Rep. 48). Where it clearly appears that a mortgage is given to indemnify the mortgagee against loss on account of his becoming a surety of the mortgagor, and the contemplated contract of suretyship is never entered into, the mortgage fails for want of consideration, although the object of the proposed surety contract was to enable the mortgagor to secure funds with which to discharge a debt owed by him to the mortgagee. *Stone* v. *Palmer*, 166 Ill. 463 (46 N. E. Rep. 1080).

Sec. 651. Mortgage to secure several notes. In Alabama it is held that where a mortgage was given to secure the payment of several annual installment notes, it is to be presumed, nothing appearing to the contrary, that the mortgage was conditioned for the payment of the several installments as they matured and that the failure to pay any installments at maturity, is such default as authorizes the foreclosure of the mortgage as to such installments. *Fields* v. *Drennen*, 115 Ala. 558 (22 So. Rep. 114).

Sec. 652. Building and loan association mortgages. The tender of the amount of a mortgage debt to a building and loan association to its legal secretary and treasurer, is made to the proper person. *Smith* v. *Old Dominion Bldg. & L. Ass'n*, 119 N. C. 257 (26 S. E. Rep. 40). A complaint to foreclose a building and loan association mortgage cannot be sustained where the association has received from the mortgagor as interest and dues an amount equal to the mortgage debt. *Interstate Sav. & L. Ass'n* v. *Cairns*, 16 Wash. 215 (47 Pac. Rep, 509). Upon foreclosure of a mortgage to secure a debt to a building and loan association, by a trustee under a power contained in the mortgage, it is his duty to pay all the proceeds of the sale thereunder over to a receiver winding up the affairs of such association, although the proceeds of the sale are in excess of the amount due on the mortgage. *Thompson* v. *North Carolina Bldg. & L. Ass'n*, 120 N. C. 420 (27 S. E. Rep. 118). Advances made to a mortgagor by an association in redemption of his stock which he does not agree to repay are not "loans" so as to be governed by a by-law fixing the rights of the association in case of default in the payment of "loans." *Commercial Bldg. & Loan Ass'n* v. *Mackenzie*, 85 Md. 182 (36 Atl. Rep. 754). Where a building and loan association provides for the payment of the debt secured, by the borrower's payment of the premiums and dues sufficient to mature 25 shares of stock held by him, it is held that the fact that the association allowed the borrower to withdraw his shares of stock and substitute a like number in a later series, did not operate as a payment of the original mortgage, so as to give an intervening mortgage, executed by him to a third party, priority. *Merchantville Bldg. & L. Ass'n* v. *Zane*, N. J. Eq. (38 Atl. Rep. 420). Where a building and loan association was unwilling to make a loan to an applicant because it did not like to trust him, one who, under an arrangement with all parties interested took the title to the applicant's land in trust and executed necessary applications and conveyances to perfect the loan, was held in the absence of an express condition exempting him from such liability, to become personally liable for the debt. *Novak* v. *Vypomocny Spolec Vlastenec B. & L. Ass'n*, 167 Ill. 264 (47 N. E. Rep. 579).

Sec. 653. Building and loan association mortgages —Usury. A penalty or fine for nonpayment of money is interest, and where a building and loan association by means of fines exacts more than the legal rate, the fines are usurious. *Smith* v. *Old Dominion Bldg. & L. Ass'n*, 119 N. C. 257 (26 S. E. Rep. 40). A building and loan association's loan, made at a legal rate of interest to a stockholder in the association, will not be held usurious on account of payments required from him on his stock. *Richard* v. *Southwestern Bldg. & L. Ass'n*, 49 La. 481 (21 So. Rep. 643); *Black* v. *Tompkins*, 63 Ark. 502 (39 S. W. Rep. 553); *Equitable Bldg. & L. Ass'n* v. *Vance*, 49 S. C. 402 (27 S. E. Rep. 274). The fact that a borrowing member of a building and loan association pays a per cent. as bonus or premium for his loan in excess of the legal rate of interest, such amount having been paid by him at a competitive sale of the loan, does not render the transaction usurious. *Setliff* v. *North Nashville Bldg. & Sav. Ass'n*, Tenn. (39 S. W. Rep. 546). Citing, *Patterson* v. *Association*, 14 Lea 677; *Bank* v. *Cook*, 60 Ark. 288 (30 S. W. Rep. 85; 46 Am. St. Rep. 200; 29 L. R. A. 761). A mortgage taken by a foreign building and loan association cannot be defeated on the ground of usury where the contract was permitted by the state where the association was organized and is not inconsistent with the laws of the state where made and it is sought to be enforced. *Freie* v. *No. 4 Fidelity Bldg. & Sav. Union*, 166 Ill. 128 (46 N. E. Rep. 784; 57 Am. St. Rep. 123).

Sec. 654. Building and loan association mortgages —Foreclosure for non-payment of fines. Where a mortgage given by a member of a building and loan association to it, authorizes a sale, if the mortgagor shall fail to "conform to all and singular, the provisions of the constitution, by-laws and regulations of said association as now existing or which may hereafter be modified," a sale may be had for default in the payment of fines where the rules of the association expressly provide for the assessment of a fine for the nonpayment of interest, the payment of which shall be secured by the mortgage of a borrowing member. *Setliff* v. *North Nashville Bldg. & Sav. Ass'n.* Tenn. (39 S.

W. Rep. 546). The court say: "It is competent for such associations, chartered under our laws, to establish by-laws for the imposition of fines upon their members for defaults in the payment of their contract dues and interest, as a method of securing their prompt payment. These fines go into the general funds of the companies, and aid in maturing the shares of stock held by the delinquents; and hence, under building and loan association laws, the delinquents share in the profits derived from them or created by them. *Patterson* v. *Association*, 14 Lea 677. Such fines, reasonable in their nature and amount, when authorized by law and the charter and by-laws of the association, have been upheld, and their payment enforced in the foreclosure of the mortgages given to it. 2 Am. & Eng. Enc. Law, 620, and note; *Hagerman* v. *Association*, 25 O. St. 187; *Parker* v. *Association*, 19 W. Va. 769; *Association* v. *Mixell*, 84 Pa. St. 818. A second fine for nonpayment of the same dues cannot be imposed. *Society* v. *Lewin*, 38 Md. 445; *Association* v. *Gallagher*, 25 O. St. 208. And, without special mention, they cannot be imposed for defaults in payment of interest on loans. *Hagerman* v. *Association*, 25 O. St. 187; *Shannon* v. *Association*, 36 Md. 388; *Association* v. *Sullivan*, 62 Cal. 394."

Sec. 655. Building and loan association mortgages —Insolvency and dissolution of association—Foreclosure. Upon the premature dissolution of a building and loan association, or upon its becoming insolvent and unable to carry out the purposes for which it was created, and passing into the hands of a receiver for the purpose of having its affairs wound up, which is, in practical effect and operation, a dissolution, the borrowing members may be compelled to pay forthwith the balance due from them on their securities although the latter in terms only provide for the payment by installments extending over a definite period of time. *Curtis* v. *Granite State Provident Ass'n*, 69 Conn. 6 (36 Atl. Rep. 1028; 61 Am. St. Rep. 17). Citing, *Windsor* v. *Bandel*, 40 Md. 172, 177; *Association* v. *Buck*, 64 Md. 388 (1 Atl. Rep. 561); *Association* v. *Zucker*, 48 Mo. 448; *Association* v. *Martin*, 18 N. J. Eq. 427; *Strohen* v. *Association*, 115 Pa. St. 278 (8 Atl. Rep. 843); *Buist* v. *Bryan*, 44 S. C. 121 (21 S.

E. Rep. 537); *Towle* v. *Society*, 61 Fed. Rep. 446; End. Bldg. Assn's (2d Ed.), § 528. When a building and loan association is put into the hands of a receiver because of its insolvency, the mortgages held by the association become due at once and the receiver can foreclose and the mortgagor can redeem. *Weir* v. *Granite State Provident As'sn*, 56 N. J. Eq. 234 (38 Atl. Rep. 643). The court say: "It seems to be entirely settled that upon the insolvency of a corporation of this class its receiver is at once empowered to collect the amount loaned to any borrower by the association, and that he can, for that purpose, proceed to foreclose a mortgage held by such association, although there had been no default by the mortgagor in the payment of any installment of interest or dues previous to the insolvency of the company. The collapse of the scheme renders it impossible to carry out the object of the association. The debtor cannot pay according to the terms of his contract with the association. The necessity of winding up the affairs of the insolvent company involves the right to immediately collect its assets and distribute the fund to its stockholders and creditors. End. Bldg. Ass'ns, par. 523; *Cook* v. *Kent*, 105 Mass. 246; *Curtis* v. *Association*, 69 Conn. 6 (36 Atl. Rep. 1023; 61 Am. St. Rep. 17); *Rogers* v. *Hargo*, 92 Tenn. 35 (20 S. W. Rep. 430). If the debts of the borrower become due by the fact of insolvency, it must follow that, if those debts are secured by a mortgage which can be foreclosed, then from the fact of insolvency the right of the mortgagor to redeem his property from the incumbrance of such mortgage must accrue. Until its mortgage debt is due, there can be no redemption. *Brown* v. *Cole*, 14 Sim. 427; *Kingman* v. *Pierce*, 17 Mass. 247; *Abbe* v. *Goodwin*, 7 Conn. 377; *Moore* v. *Cord*, 14 Wis. 281. But the moment the debt matures any one interested in the land is entitled to discharge the property from the incumbrance. Indeed, the right to foreclose and the right to redeem may be said to be reciprocal. I am therefore of the opinion that the mortgagor need not await the foreclosure proceedings of the receiver, but can now pay off the amount which could be recovered against him by a sale of his property."

Sec. 656. Building and loan association mortgages —Insolvency and dissolution of association—Determining amount due. The agreement of a borrower in a building and loan association to pay its interest and premium is made upon the implied condition that the association shall remain "a going concern," and will not be enforced against him after the association has passed into the hands of an assignee and receiver. *Curtis* v. *Granite State Provident Ass'n*, 69 Conn. 6 (36 Atl. Rep. 1023; 61 Am. St. Rep. 17). Upon the dissolution of an association on account of insolvency, premiums or bonuses previously paid by borrowing members shall be applied on the mortgage debt, but dues on shares of stock belong to the association to be used in the payment of its expenses. *Curtis* v. *Granite State Provident Ass'n*, 69 Conn. 6 (36 Atl. Rep. 1023; 61 Am. St. Rep. 17). Where a building and loan association mortgage has become due on account of the insolvency of the association and the appointment of a receiver, in computing the amount then due upon a mortgage, the borrower should receive credit for all his payments of interest or premium, but not of dues. When all the premium was deducted when the loan was made the borrower should be charged with the amount of money actually paid to him, with interest thereon, and credited with all interest paid by him, including interest paid upon the premium. When the premium was not deducted when the loan was made, but was paid in subsequent installments, he should be charged with the amount received and interest, and credited with interest and premiums paid, including interest on the installments of premium from time of their payment. *Weir* v. *Granite State Provident Ass'n*, 56 N. J. Eq. 284 (38 Atl. Rep. 643). The rules enunciated in this case are approved and followed in *Moran* v. *Gray*, N. J. Eq. (38 Atl. Rep. 668). For particular case determining application of payments upon a mortgage executed to a building and loan association, see *Sawtelle* v. *North American Sav., L. & Bldg. Co.*, 14 Utah 448 (48 Pac. Rep. 211).

Sec. 657. Statutes amended and new statutes. Bonds, mortgages and assignments of mortgages recorded in Delaware before July 1, 1898, without investment tax affidavit

required by Laws Vol. 21, ch. 21, § 10, are validated by Laws 1899, p. 571. For acts legalizing defective foreclosure sales in Minnesota, see Laws 1899, pp. 10, 414, 428. Neb. Code Civ. Proc,. § 852—foreclosure sales under decree in chancery —by whom made—amended, Laws 1899, p. 345. New Hampshire has a new statute regulating sales under powers of sale contained in real estate mortgages. Laws 1899, p. 257. N. Y. Code Civ. Proc., § 1627—who may be made parties to action of foreclosure—amended, Laws 1899, p. 1080. Washington has a new statute regulating sales under decree of foreclosure. Laws 1899, p. 85. Wis. Stat. 1898, § 3526—service of notice of foreclosure of mortgage upon mortgagor—amended, Laws 1899, p. 655, § 40.

NOTICE.

EPITOME OF CASES.

Sec. 658. Knowledge sufficient to charge one with notice. A purchaser of land must look to the title papers under which he purchases, and he is chargeable with notice of the facts appearing upon their face; also with knowledge of all facts suggested therein, and which he might, with the exercise of reasonable prudence and diligence, have ascertained. *Knowles* v. *Williams*, 58 Kan. 221 (48 Pac. Rep. 856); *Simms* v. *Freiherr*, 100 Ga. 607 (28 S. E. Rep. 288). The fact that the agent of a mortgagor for procuring a loan, examines the abstract of title and represents to the mortgagee that the mortgagor had a perfect title, does not make him the agent of the mortgagee so as to charge the latter with knowledge of facts concerning the title, known to such agent. *Farmer* v. *American Mortg. Co.*, 116 Ala. 410 (22 So. Rep. 426). Structures erected upon land under a parol license are notice of the rights of the licensee. *Joseph* v. *Wild*, 146 Ind. 249 (45 N. E. Rep. 467).

Sec. 659. Notice by publication. An action to cancel a deed of real and personal property may be prosecuted

against a nonresident by publication. Nev. Gen. Stat. § 3040, applied. *Robinson* v. *Kind*, 28 Nev. 380 (47 Pac. Rep. 977). An affidavit for publication of summons must describe the same cause of action that is stated in the complaint. *Vermont Loan & T. Co.* v. *McGregor*. Idaho (51 Pac. Rep. 104). Under Neb. Code Civ. Proc., § 408, proof of a publication of notice required by law to be made in a newspaper may be made by affidavit of any one knowing the fact, and such knowledge need not be expressly stated in the affidavit. *Johnston* v. *Colby*, 52 Neb. 827 (72 N. W. Rep. 818). Service of summons by publication on "Emma H. Morris" is not a good service on "Emma H. Durham," a married woman, who had borne the name of "Durham" for nearly twenty years, though her maiden name was "Emma H. Morris;" and such an attempted service in an action of partition, under which it is attempted to sell her interest in lands belonging to the estate of her deceased father should be set aside on her motion. *Morris* v. *Tracy*, 58 Kan. 137 (48 Pac. Rep. 571). Cal. Code Civ. Proc., §§ 412, 415, subd. 8, construed and applied—service by publication—sufficiency of affidavit of notice by publication. *Woodward* v. *Brown*, 119 Cal. 288 (51 Pac. Rep. 2; 63 Am. St. Rep. 108). Mo. Rev. Stat. 1889, § 7098, construed and applied—St. Louis Daily Record held to be a newspaper. *Kingman* v. *Waugh*, 139 Mo. 360 (40 S. W. Rep. 884). Wis. Stat. 1898, §§ 3891, 4005—notice by publication of sales made by executors or guardians—amended, Laws 1899, p. 256.

NUISANCE.

EPITOME OF CASES.

Sec. 660. What constitutes a nuisance. A business which is not *per se* a nuisance will not be enjoined until it is so operated as to constitute a nuisance. *Windfall Mfg. Co.* v. *Patterson*, 148 Ind. 414 (47 N. E. Rep. 2; 62 Am. St. Rep. 582). A structure resting wholly upon one's land is not a nuisance merely because it obstructs the passage of light and

air to the building of an adjoining owner. *Ingwersen* v. *Barry*, 118 Cal. 842 (50 Pac. Rep. 586). A recent statute of Minnesota provides that "any fence, or other structure in the nature of a fence, unnecessarily exceeding six (6) feet in height, maliciously erected or maintained for the purpose of annoying the owners or occupants of adjoining property shall be deemed a private nuisance," and may be abated as such. Laws 1899, p. 426. An electric light plant, operated in a manufacturing district, which does not constitute a source of injury to the health of, or any injury or inconvenience to, a property owner by reason of smoke, sparks, soot or cinders, and does him no material injury, cannot be abated by him as a nuisance because the machinery makes a buzzing noise till a late hour of the night. *McCann* v. *Strang*, 97 Wis. 551 (72 N. W. Rep. 1117). Where a street car company does not possess the right of eminent domain but has simply the right to construct and operate its moters and cables, the operation of its machinery upon its own property to the injury of the adjoining owner may become an actionable nuisance. *Rogers* v. *Philadelphia Traction Co.*, 182 Pa. St. 478 (38 Atl. Rep. 899; 61 Am. St. Rep. 716). Particular case in which a sewer is held not to be a nuisance. *Bennett* v. *National Starch Mfg. Co.*, 103 Ia. 207 (72 N. W. Rep. 507). Particular facts held insufficient to show a brick factory to be a nuisance. *Ladd* v. *Granite State Brick Co.*, N. H. (37 Atl. Rep. 1041). For an exhaustive discussion and collection of authorities as to whether the storing of gun powder or dynamite constitutes a nuisance, and the liability of persons storing it for the destruction or injury of property, see *Kinney* v. *Koopman*, 116 Ala. 310 (22 So. Rep. 593; 37 L. R. A. 497); *Rudder* v. *Koopman*, 116 Ala. 332 (22 So. Rep. 601; 37 L. R. A. 489).

Sec. 661. What constitutes a nuisance—Obstruction or pollution of watercourse. The unlawful obstruction of a stream so as to overflow one's premises in a manner to be injurious to his property and pernicious to health, constitutes a nuisance which he is entitled to have abated, although he might possibly ward off the evil effects and dangerous results at his own expense. *Masonic Temple Ass'n* v. *Banks*, 94

Va. 695 (27 S. E. Rep. 490). Applying Cal. Penal Code, § 370; Civil Code, §§ 3479, 3480, which declare a public nuisance to be anything which is "an obstruction to the free use of property so as to interfere with the comfortable enjoyment of life or property by an entire community or neighborhood, or any considerable number of persons," it is held that the pollution of the water of a nonnavigable river, by means of the refuse from a mill so as to destroy the fish therein, is a nuisance which may be enjoined by the state. *People* v. *Truckee Lum. Co.*, 116 Cal. 397 (48 Pac. Rep. 374; 58 Am. St. Rep. 188; 39 L. R. A. 581). The court say: "The dominion of the state, for the purposes of protecting its sovereign rights in the fish within its waters, and their preservation for the common enjoyment of its citizens, is not confined within the narrow limits suggested by defendant's argument. It is not restricted to their protection only when found within what may in strictness be held to be navigable or otherwise public waters. It extends to all waters within the state, public or private, wherein these animals are habited, or accustomed to resort, for spawning or other purposes, and through which they have freedom of passage to and from the public fishing grounds of the state. To the extent that waters are the common passageway for fish, although flowing over lands entirely subject to private ownership, they are deemed for such purposes public waters, and subject to all laws of the state regulating the right of fishery. *Cotrill* v. *Myrick*, 12 Me. 222; *State* v. *Franklin Falls Co.*, 49 N. H. 240 (6 Am. Rep. 518); *State* v. *Roberts*, 59 N. H. 256, 484 (47 Am. Rep. 199)."

Sec. 662. Liability for continuing an existing nuisance. Ordinarily a tenant for years is not liable for continuing an existing nuisance created by his landlord, but a party having possession of the premises under a lease for 999 years, is for all practical purposes the owner thereof; and his responsibility for maintaining and keeping in repair a structure upon the premises so held by him, which operates to the nuisance of a third person, is that of an owner, and not that of a tenant for years. *Meyer* v. *Harris*, 61 N. J. L. 88 (38 Atl. Rep. 690). One who erects a structure or construction which

creates a nuisance, and then conveys to another his title, and the lands and premises on which the structure or construction exists and is maintained, with a covenant in the deed of conveyance for quiet enjoyment, and right to maintain such structure or construction, is liable for the continuance of the nuisance, upon the ground that he affirms it, and must be regarded in law as continuing it. He is the author of the original wrong and, thus transferring the premises with the original wrong, still existing, he is treated as affirming its continuance. *East Jersey Water Co.* v. *Bigelow*, 60 N. J. L. 201 (38 Atl. Rep. 631).

Sec. 663. Remedies and proceedings. The creation or continuance of a nuisance which is likely to produce irreparable injury may be enjoined. *Masonic Temple Ass'n* v. *Banks*, 94 Va. 695 (27 S. E. Rep. 490). But the drilling of a gas well within 150 feet of a residence cannot be enjoined by the owner thereof, on account of apprehended injuries which may never occur. *Windfall Mfg. Co.* v. *Patterson*, 148 Ind. 414 (47 N. E. Rep. 2; 62 Am. St. Rep. 532). Where one's private right to fish in navigable waters would be obstructed by the erection of the proposed obstruction, he may enjoin its erection as a nuisance. *Morris* v. *Graham*, 16 Wash. 348 (47 Pac. Rep. 752; 58 Am. St. Rep. 33). One having a right of way over lands may enjoin as a nuisance its obstruction, although he has no interest in the land over which the way is claimed; and such action may be maintained against the special administrators of a decedent who continue an obstruction created by him. *Hardin* v. *Sin Claire*, 115 Cal. 460 (47 Pac. Rep. 368). Where, in a proceeding to enjoin a municipality from abating a nuisance, in pursuance of irregular proceedings had by it, such municipality files a cross bill seeking a judicial determination of the existence of the nuisance, no objection being made to the jurisdiction of the court until all the evidence is heard on that question, the court may retain the cause and decree an abatement of the nuisance. *Coast Co.* v. *Mayor of Borough of Spring Lake*, 56 N. J. Eq. 615 (36 Atl. Rep. 21). When a nuisance is prospective and threatened, a court of equity may intefere to prevent its being brought into existence; but when what is claimed to be a nuisance

already exists, the general rule is that the fact that it is a nuisance must be established by a suit at common law before a court of equity will intefere to abate. This general rule is subject to exceptions, as in cases of pressing or imperious necessity, or where the right is in danger of being injured or destroyed; or where there is no adequate remedy at law. *Tracy* v. *Le Blanc*, 89 Me. 304 (36 Atl. Rep. 399). A private action is maintainable for a public nuisance by one who suffers therefrom some particular loss or damage beyond that suffered by him in common with all others affected by the nuisance. *Nolon* v. *City of New Britain*, 69 Conn. 668 (38 Atl. Rep. 708). In an action to recover damages resulting to property from the maintenance of a nuisance, damages accruing since the commencement of the action on account of the same nuisance, may be set up by supplemental petition. *Foote* v. *Burlington Gaslight Co.*, 103 Ia. 576 (72 N. W. Rep. 755). Both past and future damages resulting to property from the operation of an electric light plant constructed by one company and sold to and operated by another company may be recovered from either or both of said companies. *Hyde Park Thompson Houston Elec. L. Co.* v. *Porter*, 167 Ill. 276 (47 N. E. Rep. 206). Where a nuisance consists of the obstruction of the free use of an alley by the occupants of two cottages belonging to an abutting owner, one of which is rented and the other is occupied by the owner's son, rent free, it is held that such owner's measure of damages is the diminution of the value of the use during the time the nuisance was continued. *Bannon* v. *Murphy*, Ky. (38 S. W. Rep. 889). N. H. Pub. Stat., ch. 205, § 5—abatement of nuisances on information or petition—amended, Laws 1899, p. 322.

Sec. 664. Legislative and municipal control. The power of a municipality to abate a public nuisance must be regularly exercised or its acts thereunder may be enjoined. The power of a municipal officer to abate a public nuisance without statutory or judicial process stands upon the same footing as the power of a citizen. *Coast Co.* v. *Mayor of Borough of Spring Lake*, 56 N. J. Eq. 615 (36 Atl. Rep. 21). A statute (Ind. Acts 1895, p. 259) empowering a municipal corporation to declare what shall constitute a nui-

sance, does not authorize it to declare an existing thing to be a nuisance, which is in fact not a nuisance. *City of Evansville* v. *Miller*, 146 Ind. 618 (45 N. E. Rep. 1054; 38 L. R. A. 161). Smoke is not a nuisance, *per se*, and a municipal ordinance declaring "the emission into the open air of dense black or thick gray smoke, within the corporate limits of the city," to be a nuisance, exceeds the statutory authority of such city, "to declare, prevent, and abate nuisances on public or private property and the causes thereof." *City of St. Louis* v. *Heitzeberg Pack. & Prov. Co.*, 141 Mo. 375 (42 S. W. Rep. 954; 64 Am. St. Rep. 516; 39 L. R. A. 551). See opinion for review of authorities on this subject. An ordinance which prohibits as a nuisance, the erection or use of "any awning, except the same be upon a suitable frame, and attached entirely to the building, which awning shall not, when extended, be less than six feet from the sidewalk," is void for uncertainty where it contains no provision for determining what would be a "suitable" frame. *State* v. *Clarke*, 69 Conn. 371 (37 Atl. Rep. 975; 61 Am. St. Rep. 45; 39 L. R. A. 670). A city is not liable for injuries to private persons resulting from a failure to enforce its police regulations which provide for the prevention and abatement of nuisances. *Butz* v. *Cavanaugh*, 127 Mo. 503 (38 S. W. Rep. 1104; 59 Am. St. Rep. 504). Mass. Stat. 1890, ch. 59, construed and applied—filling of low land by a city to abate a nuisance—assessment of expense to landowner—notice. *City of Lawrence* v. *Webster*, 167 Mass. 518 (46 N. E. Rep. 123).

Sec. 665. Acquiring right to maintain public nuisance by prescription. The right to maintain a public nuisance cannot be acquired by prescription. *Nolan* v. *City of New Britain*, 69 Conn. 668 (38 Atl. Rep. 708). The court say: "No length of time can legitimate or enable a party to prescribe for a public nuisance. *People* v. *Cunningham*, 1 Denio, 524 (43 Am. Dec. 709); *Mills* v. *Hall*, 9 Wend. 315; *Veazie* v. *Dwinel*, 50 Me. 479, 490; *Com.* v. *Upton*, 6 Gray 476; Wood, Nuis. 722; 19 Am. & En. Enc. Law, 80. When an action is brought by a party who has suffered a special injury in consequence of a public nuisance, a prescriptive right to do

the acts complained of cannot be maintained against him. *Bowen* v. *Wendt*, 103 Cal. 236 (37 Pac. Rep. 149); *People* v. *Gold Run Ditch & Min. Co.*, 66 Cal. 138 (4 Pac. Rep. 1152; 56 Am. Rep. 80); *Boston Rolling Mills* v. *City of Cambridge*, 117 Mass. 396; *O'Brien* v. *City of St. Paul*, 18 Minn. 176 (Gil. 163); Cooley, Torts 614."

PARTITION.

EPITOME OF CASES.

Sec. 666. Agreements in respect to partition. The absolute right to have partition may be waived by agreement. *Martin* v. *Martin*, 170 Ill. 639 (48 N. E. Rep. 924; 62 Am. St. Rep. 411). Prior to Va. Code 1887, § 2413, partition of land could be made by parol as well as by deed, as at common law; and in making such partition if one or more of the parceners were females, and married, their husbands could make partition between them, which would be binding during the lives of their husbands and afterwards, unless after the death of the husband the wife or her heir could show that the part received by her husband in the partition was less in value than the part received by the other parcener. *Brooks* v. *Hubble*, Va. (27 S. E. Rep. 585). In West Virginia it is held that where a wife acquires by inheritance an interest in land as a tenant in common with others, in which her husband is entitled to curtesy by reason of issue of the marriage, he can make a valid partition of the land with the other cotenants either by parol or written agreement; but a deed executed by him and his wife in pursuance of such partition, which on account of a defective acknowledgment is void as to the wife, conveys only the life estate of the husband. *Arnold* v. *Bunnell*, 42 W. Va. 478 (26 S. E. Rep. 359). Tenants in common may make a parol partition of the surface of the land, leaving the minerals beneath in common; but an agreement of partition will be presumed to include both the surface and minerals, and one who asserts the contrary has the burden of proof. *Byers* v. *Byers*, 188 Pa. St. 509 (38 Atl. Rep. 1027;

68 Am. St. Rep. 765; 39 L. R. A. 587). As to separating surface and mineral ownership by partition, see Ballards' Law Real Prop., Vol. V, § 621.

Sec. 667. Who may have partition. In Missouri it is held that one claiming as a cotenant with parties who have ousted him and hold adversely at the time he brings his action for partition, cannot maintain the action, but he must resort to an action of ejectment in order to settle the question of title. *Hutson* v. *Hutson*, 139 Mo. 229 (40 S. W. Rep. 886). But after having established his title in an action of ejectment, he may maintain an action for partition against the person or persons in possession. *Estes* v. *Nell*, 140 Mo. 689 (41 S. W. Rep. 940). It is held by a divided court that partition of land will not be delayed until the establishment, on an accounting in a pending suit in equity, of the amount of a possible lien in favor of one of the co-owners upon the shares of the others. Such lien will attach to the divided shares, and rights acquired *pendente lite* will be subject thereto. *Pomeroy* v. *Pomeroy*, 55 N. J. Eq. 568 (37 Atl. Rep. 754). Where lands have been purchased by a partnership for development and sale, one of the partners cannot interfere with the venture by enforcing partition before the scheme of the partnership is carried out or shown to be impracticable. *Craighead* v. *Pike*, N. J. Eq. (38 Atl. Rep. 296). Under Mo. Rev. Stat. 1889, § 7143, land descending to heirs may be partitioned before final settlement of the estate to whose demands the land may then be subject. *Chrisman* v. *Divinia*, 141 Mo. 122 (41 S. W. Rep. 920). Applying Mill. & V. Tenn. Code, § 4003, 4022, it is held that defeasible estates, contingent remainders, or mere expectancies under an executory devise, cannot be partitioned. *Muldoom* v. *Trewhitt*, Tenn. (38 S. W. Rep. 109). The fact that lands are subject to an easement in favor of a third person, is no bar to an action to partition them. *Crocker* v. *Cotting*, 170 Mass. 68 (48 N. E. Rep. 1023; 64 Am. St. Rep. 278; 39 L. R. A. 215). Where the right of a plaintiff in partition to have half of the estate set off to him in severalty is undisputed, he is entitled to a decree although there may be a dispute among the

defendants as to the title to the other half. *Egner* v. *Meis.*, N. J. Eq. (86 Atl. Rep. 948).

Sec. 668. Nature of right to partition—Partition of leased premises. Where a case is fairly within the law authorizing a partition, the right to partition is imperative, and absolutely binding upon courts of equity. In such a case the right of partition is a matter of right, and not of mere grace. The mere fact that inconvenience or difficulty of making distribution, or even probable loss, is involved in making partition, in no wise affects the absolute right to have partition. Where real property leased for a term of years is owned by several persons as tenants in common, both of the rents and the reversion, partition upon the petition of one of the tenants in common may be had, and, in case of a sale being thereby rendered necessary, the lessee will become a tenant of the purchaser of the rents and reversion. *Oliver* v. *Lansing*, 50 Neb. 828 (70 N. W. Rep. 369).

Sec. 669. Partition of buildings standing on land owned in severalty. Construing Ill. Rev. Stat., ch. 106, § 1, which provides " that when land, tenements or hereditaments are held in joint tenancy, tenancy in common or coparcenary, * * * any one or more of the persons interested therein may compel a partition thereof by bill in chancery," it is held that partition cannot be had of a building standing upon two adjoining pieces of land, each of which are owned in severalty by different persons, since each owner is regarded as the owner in severalty of that part of the building which stands on his land. *Stevenson* v. *Bachrach*, 170 Ill. 253 (48 N. E. Rep. 827). The court say: " In *Mc Connel* v. *Kibbe*, 43 Ill. 12, we held that an estate must be held jointly, in common, or in coparcenary, in order to be the subject of partition under our statute, and that premises belonging in severalty to two, and no portion thereof belonging jointly to both, are not subject to partition under our statute, or under any proceeding known in courts of equity."

Sec. 670. Sufficiency of complaint or petition—Proof required of plaintiff. A complaint which alleges that

the plaintiff and the defendants are the only children and heirs at law of one who died intestate seised and possessed of the real estate in question, sufficiently shows the rights of the parties to the land. *Martin* v. *Martin*, 95 Va. 26 (27 S. E. Rep. 810). Under Ala. Code 1886, § 3239, a bill for partition is insufficient where it does not set forth "a full and accurate description of the property sought to be divided or partitioned." *Stein* v. *McGrath*, 116 Ala. 593 (22 So. Rep. 861). Applying Md. Code, Art. 16, § 116, authorizing a partition by sale, where it appears that the division cannot be made "without a loss or injury" a complaint alleging that a "partition or division of the property cannot be made without a sale, owing to the nature of the property and the number of the tenants in common," is sufficient to give the court jurisdiction to order a sale, as against infant cotenants. *Ballantyne* v. *Rusk*, 84 Md. 649 (36 Atl. Rep. 361). Where a defendant's only adverse claim is for improvements put upon the land and the plaintiff has a complete record title, he will not be required to establish his title at law before asking for partition, and where such a plaintiff shows that he acquired his title by purchase and payment therefor, the burden is upon the defendant to show some notice of his equitable rights prior to the purchase. *Hooper* v. *De Vries*, 115 Mich. 281 (73 N. W. Rep. 132). The plaintiff's proof of title is insufficient where his chain of title shows a conveyance from the widow of one former grantee and from the heirs of another former grantee, there being no evidence to show their authority for making such conveyance; and proof of such authority is not dispensed with by the defendant's admission that the plaintiff is seised of the interest, if any, owned by the grantee whose heirs pretend to convey, where the fact of such grantee having any interest is in issue. *Wood* v. *Brown*, 104 Ia. 124 (73 N. W. Rep. 608). Particular complaint held sufficient. *Sullivan* v. *Lumsden*, 118 Cal. 664 (50 Pac. Rep. 777). Particular supplemental petition in an action for partition, held not to set up a new cause of action. *Leach* v. *Germania Bldg. Ass'n*, 102 Ia. 125 (70 N. W. Rep. 1090). Ia. Code, §§ 3278, 3279, construed and applied—sufficiency of petition—amendment. *Darr* v. *Darr*, 102 Ia. 453 (71 N. W. Rep. 419).

Sec. 671. Parties to actions for partition. Where the main question is whether or not the lands are subject to partition, persons who only have an interest therein, in case they are partitioned, are proper parties. *Craighead* v. *Pike*, N. J. Eq. (38 Atl. Rep. 296). In an action for partition between minor devisees, brought before the settlement of the testator's estate, their guardian and the executor of the estate are proper parties. Mo. Rev. Stat. 1889, §§ 7139, 7145, applied. *Budde* v. *Rebenack*, 137 Mo. 179 (38 S. W. Rep. 910). Mortgagees and judgment creditors are not necessary parties. *Martin* v. *Martin*, 95 Va. 26 (27 S. E. Rep. 810); *Cheney* v. *Ricks*, 168 Ill. 533 (48 N. E. Rep. 75). A railroad company having a right of way across lands involved in an action for partition, need not be a party to the suit where neither the plaintiff nor defendant in such suit claim any right adverse to the right of way. *Hooper* v. *McAllister*, 115 Mich. 174 (73 N. W. Rep. 133). A husband is not a necessary party where his wife is a defendant, *Estes* v. *Nell*, 140 Mo. 639 (41 S. W. Rep. 940); and upon an elaborate discussion of the statutory provisions of Indiana as to the inchoate rights of a wife in the lands of her husband, it is held that the wife of a cotenant is not a necessary party to a proceeding to partition the land, although the effect of the partition sale thereunder, is to extinguish her interest in the land. Ind. Rev. Stat. 1894, §§ 2652, 2660, construed and applied. Jordan, J., dissenting. *Haggerty* v. *Wagner*, 148 Ind. 625 (48 N. E. Rep. 366; 39 L. R. A. 384).

Sec. 672. Practice in actions for partition—Miscellaneous notes. A proceeding instituted by petition in which all the joint owners of property unite stating their respective interests; that it was not susceptible of division in kind so as to make an equitable partition; that it was advisable and necessary that a partition of same "should be made between the said parties in interest;" and which concludes with a prayer for general relief, constitutes a partition suit. *Moore* v. *Blagge*, 91 Tex. 151 (38 S. W. Rep. 979). Where lands are incapable of exact or fair division, the court has power to compensate the inequality by a charge upon one portion by way of rent, servitude or easement. *Martin* v. *Martin*, 95

Va. 26 (27 S. E. Rep. 810). If necessary or desirable to a just division, a right of way may be given to one cotenant over the share assigned to another. *Merrill* v. *Durrell*, 67 N. H. 108 (36 Atl. Rep. 613). Citing, *Cheswell* v. *Chapman*, 88 N. H. 14 (75 Am. Dec. 158). Where land was conveyed to two persons by a county, in pursuance of a contract made by it with them, by which the land was to be conveyed in consideration of certain services, upon partition, their rights should be determined by the contract by which they acquired title, in the absence of any new agreement between them. *Schuster* v. *Gamble*, 108 Ia. 495 (72 N. W. Rep. 680). Where partition is sought of several separate parcels upon which separate mortgages have been executed to different mortgagees, the decree should treat the lands in the respective mortgages as distinct parcels and order partition of each parcel to be made between the owners thereof. *Cheney* v. *Ricks*, 168 Ill. 533 (48 N. E. Rep. 75). One excepting to a report of commissioners on the ground that the partition is unequal as to quality and quantity, must specifically point out the inequality. *Martin* v. *Martin*, 95 Va. 26 (27 S. E. Rep. 810). A decree ordering the sale for partition and the execution of deeds by the officer, is not void because no provision is made for report of sale and confirmation by the court. *Moore* v. *Blagge*, 91 Tex. 151 (38 S. W. Rep. 979). Where a parol partition between coparceners is relied on as a defense to a bill filed by one of the parceners or his or her heirs for partition, the burden of proof is on those setting it up to show that such partition was made, and it is not sufficient to show simply the fact that it was made; but the burden of proof is not lifted until it is shown to whom the several lots were assigned. *Brooks* v. *Hubble*, Va. (27 S. E. Rep. 585). Evidence as to the drainage of a plantation, the location of ditches and fences which goes to show its character as to its divisibility in kind, is receivable. *Soniat* v. *Supple*, 49 L. A. 41 (21 So. Rep. 165). For cases determining particular questions of evidence, see *Davis* v. *Pacific Imp. Co.*, 118 Cal. 45 (50 Pac. Rep. 7); *Sullivan* v. *Lumsden*, 118 Cal. 664 (50 Pac. Rep. 777).

Applying a statute of Missouri, it is held that a decree confirming a report of commissioners in partition, will not be

set aside because they exempt from partition one-sixteenth of an acre of a farm of 140 acres which has been used as a family burying ground, and set it off to all the heirs, declaring that it shall continue to be a family burying ground. *Eddie* v. *Eddie*, 138 Mo. 599 (39 S. W. Rep. 451). A decree confirming a report of referees will be set aside where they have inadvertently partitioned a piece of land not described or referred to in the complaint or in the findings or interlocutory judgment, and which was then owned and in the adverse possession of one not a party to the suit. *Sullivan* v. *Lunsden*, 118 Cal. 664 (50 Pac. Rep. 777). A court having power to set aside a decree in partition on account of the fraud of some of the parties thereto, a defendant who was not a party to the fraud cannot object to the vacation of the decree simply because it will deprive her of an adjudication as to her right of heirship. *Furman* v. *Furman*, 153 N. Y. 309 (47 N. E. Rep. 577; 60 Am. St. Rep. 629).

Cal. Prac. Act., § 808, construed and applied—judgment for costs. *Lacoste* v. *Eastland*, 117 Cal. 678 (49 Pac. Rep. 1046). McClain's Ia. Code, § 4517, 4531, construed and applied—taxation of costs. *Finch* v. *Garrett*, 102 Ia. 381 (71 N. W. Rep. 429). Iowa Code, § 3277, construed and applied—adjustment of lien claims on the property by one cotenant and claims for rent against one cotenant occupying the property. *Wilcke* v. *Wilcke*, 102 Ia. 173 (71 N. W. Rep. 201). Mo. Rev. Stat. 1889, § 7140, applied—action for partition by minors—appointment of guardian by court. *Chrisman* v. *Divinia*, 141 Mo. 122 (41 S. W. Rep. 920). Under Mo. Rev. Stat. 1889, § 7146, where defendants fail to ask partition among themselves, the court may set off their shares together in one parcel. *Eddie* v. *Eddie*, 138 Mo. 599 (39 S. W. Rep. 451).

Sec. 673. Procedure upon death of party—Power of court. Where a cotenant defendant dies pending a suit for partition it is necessary that the heir or devisee of such cotenant be made a party defendant before proceeding with the partition, and the executor of such deceased cotenant is not a proper party to represent the heir or devisee where it is not shown by the will that such executor is invested

with, and authorized to represent, the title. *Nelson* v. *Haisley*, 39 Fla. 145 (22 So. Rep. 265). Where a defendant dies after the trial of the cause but before the rendition of the decree, the decree may be entered *nunc pro tunc* and the rights of the claimants of his interest may be settled on petition for distribution, or such claimants may be brought in by petition to revive and their rights determined before the decree. *Molineux* v. *Raynolds*, 55 N. J. Eq. 187 (86 Atl. Rep. 276). Where, pending an action between tenants in common for partition of lands which can only be effected by a sale thereof, it appears that there is an unsettled administration of a deceased cotenant's estate pending in the probate court, and that there are conflicting claims between the cotenants as to who is entitled to receive his interest, the court having jurisdiction of the partition action, may determine all the interests of the cotenants except only the issues between contesting claimants, in the probate court, of the interest of the deceased cotenant, and the premises may be sold to effect a just division, the decree of sale leaving the rights of the contesting claimants to be determined in a court having jurisdiction thereof. *Grant* v. *Murphy*, 116 Cal. 427 (48 Pac. Rep. 481; 58 Am. St. Rep. 188).

Sec. 674. Decree of partition between defaulted defendants. Construing Ind. Rev. Stat. 1894, §§ 1200, 1203, 1207, providing that "any person holding lands as joint tenant or tenant in common * * * may compel partition in the manner provided by this act," and by application to the circuit court "by petition setting forth a description of the premises and the title therein of the parties interested;" and "if upon the trial of any issue, or upon default, or by consent of parties, it shall appear that partition ought to be made, the court shall award an interlocutory judgment that partition be made to parties who may desire the same, specifying therein the share assigned to each, and taking into consideration advancements to heirs of a person dying intestate; and the residue of the premises shall remain for the persons entitled thereto, subject to a future partition," it is held that a decree determining the interests of defaulted defendants, alleged to be cotenants, making partition between them, made without their

request, is not conclusive upon them, as between themselves. Howard, C. J., and McCabe, J., dissenting. *Findley* v. *Cathcart*, 149 Ind. 470 (48 N. E. Rep. 586; 68 Am. St. Rep. 292).

Sec. 675. Payment of owelty—Lien for. A lien for owelty of partition partakes of the nature of the vendor's lien, and constitutes a prior incumbrance upon the land on which it is charged, and follows the land into whosesoever hands it may come. The lien is not released by taking the personal obligation of another or other security for its payment, nor is it merged by a judgment or decree therefor, but subsists until it is clearly shown to have been waived or released, or has been satisfied. *Jameson* v. *Rixey*, 94 Va. 342 (26 S. E. Rep. 861; 64 Am. St. Rep. 726). Pa. Pub. Laws 1876, p. 140, construed and applied—payment of owelty—allowance of interest. *In re Meyers' Estate*, 179 Pa. St. 157 (36 Atl. Rep. 289).

Sec. 676. Allowance of attorney's fees. The allowance of a claim for attorney's fees is not a motion within the meaning of Mo. Rev. Stat. 1889, § 2086, requiring motions to be filed one day before they are determined. *Eddie* v. *Eddie*, 138 Mo. 599 (39 S. W. Rep. 451). Under McClain's Ia. Code, § 4582, attorney's fees should not be taxed where there is a contest. *Finch* v. *Garrett*, 102 Ia. 381 (71 N. W. Rep. 429). Construing Montana Code Civ. Proc., § 1394, providing that "the costs of partition, including reasonable counsel fees expended by the plaintiff or either of the defendants for the common benefit, fees of referees or other disbursements, must be paid by the parties respectively entitled to share in the lands divided in proportion to their respective interests therein, and may be included and specified in the judgment," it is held that it is error for the court to limit an allowance to services performed after entry of judgment and decree, and compensation should be allowed for necessary professional services of counsel in conducting the proceedings in partition to a completion for the common benefit of all parties thereto. *Murray* v. *Conlon*, 19 Mont. 389 (48 Pac. Rep. 743).

In Illinois it is held that an allowance of attorney's fees to plaintiff's attorney, will not be sustained on appeal unless the evidence upon which it is based is preserved in the record.

And in construing the statute of that state (3 Starr. & C. Ann. Stat. (2d Ed.), p. 2927, § 40), which provides, "In all proceedings for a partition of real estate, when the rights and interests of all the parties in interest are properly set forth in the petition or bill, the court shall apportion the costs, including the reasonable solicitor's fee, among the parties in interest in the suit, so that each party shall pay his or her equitable portion thereof, unless the defendants, or some one of them, shall interpose a good and substantial defense to said bill or petition," *Metheny* v. *Bohn*, 164 Ill. 495 (45 N. E. Rep. 1011), the court say: "By the statute the court is directed to apportion the fees when such rights and interests are properly set forth, unless some defendant shall interpose a good and substantial defense to the bill or petition. To such a bill no defense could be successful, and to say that defendant should pay complainant's solicitor, unless he succeeded in an impossible defense, would be absurd. It is evident that the good and substantial defense which may be interposed, and which will prevent the allowance of the fee, is a defense of a good and substantial character. The legislature could not have intended the statute as an illogical absurdity, and we think it should be construed as meaning that a defense valid and substantial in character made in good faith, and on reasonable ground, should exempt a defendant from paying a solicitor of his adversary, not for services rendered to him, but for a hostile attack upon what he in good faith believes to be his substantial right. If the bill states the rights and interests of the parties correctly, a defense which is merely formal, frivolous, or vexatious, or which is not undertaken in good faith, would not be regarded as good or substantial. The defense in this case was of a good and substantial character, and was not undertaken without reasonable grounds, although it was overcome by evidence on the part of complainant, and proved unsuccessful. In such a case it would not be equitable for the defendant to pay a part of a solicitor's fee solely earned as his adversary." Under the Illinois statute, the court will not make an allowance of a solicitor's fee where the legal services are all performed by one of the complainants who is an attorney. *Cheney* v. *Ricks*, 168 Ill. 588 (48 N. E. Rep. 75).

Sec. 677. Adjudication of title in action for partition—Force and effect of decree. A third party will not be allowed to intervene for the purpose of litigating an independent adverse title. *Hillens* v. *Brinsfield*, 118 Ala. 304 (21 So. Rep. 208). The statute of Missouri (Rev. Stat. 1889, §§ 7143, *et seq.*), authorizes the settlement of conflicting rights, claims and interests of the parties among themselves and a partition of the land in the same proceeding. *Budde* v. *Rebenack*, 137 Mo. 179 (38 S. W. Rep. 910). Recitals in a decree of partition as to admissions of title are conclusive against the parties thereto and their privies. *Green* v. *Bennett*, 120 N. C. 394 (27 S. E. Rep. 142). A decree of partition cannot have the effect of showing title in the parties to it, as against strangers to the suit and its parties. *High's Heirs* v. *Pancake*, 42 W. Va. 602 (26 S. E. Rep. 536). A decree for partition sale does not conclude the homestead rights of minor defendants, where such rights are not mentioned in any of the proceedings upon which it is based. *White* v. *Sharpe*, 98 Tenn. 33 (39 S. W. Rep. 1051). Where one seeking partition of lands in which she has an interest, consents to a decree assigning a portion of the land to her "for her sole and separate use during her life and at her death to her children then living, and the issue of such as may be dead," such a decree is binding upon her and creates a valid contingent remainder in fee. *Bigley* v. *Watson*, 98 Tenn. 353 (39 S. W. Rep. 525; 38 L. R. A. 679). Upon an exhaustive review of the Indiana cases, upon the question as to how far title is adjudicated in partition proceedings, it is held that a decree in such proceedings is conclusive upon the parties thereto, upon the question of their holding the land involved in the decree as cotenants, and such decree estops a party thereto from asserting that he held any part of the premises in severalty, adversely to his cotenants at the time of the partition, although he gives as an excuse for not asserting such right that he was mistaken as to his rights. *Irvin* v. *Buckles*, 148 Ind. 389 (47 N. E. Rep. 822).

Sec. 678. Partition sales. In Texas it is held that a court of equity has jurisdiction, independent of the statute, to order property sold for partition when found to be incapable of partition in kind without serious injury to the interests of

the parties. Rev. Stat. 1879, art. 8490, applied. *Moore* v. *Blagge*, 91 Tex. 151 (38 S. W. Rep. 979). See opinion for review of English cases. A partition by sale will not be ordered against the objection of one of the coparceners, when it is not shown that a division in kind is not practicable, or that loss or inconvenience would result from it. *Coach* v. *Hake*, 49 La. 458 (21 So. Rep. 640). Where, in case the land is indivisible, the statute allows any one or more of the parties to elect to take it at its appraised value, it is error for the court to direct a sale of the land until the parties interested have been afforded reasonable time and a reasonable opportunity to elect to take the land at the appraisement. *Morris* v. *Tracy*, 58 Kan. 187 (48 Pac. Rep. 571). In the absence of a statute authorizing differently, a partition sale of incumbered real estate must be made subject to such incumbrance. *Becker* v. *Carey*, N. J. Eq. (36 Atl. Rep. 770). Applying La. Rev. Civ. Code, art. 1843, it is held that an heir who purchases at the sale to effect the partition, to complete his title must pay the surplus of the price over the portion coming to him as fixed by the partition; and one taking a mortgage from such purchaser takes subject to the title of the coheirs until the portion due them has been paid. *People's Bank* v. *David*, 49 La. 186 (21 So. Rep. 174). A partition sale is not binding upon infant defendants for whom no guardian *ad litem* was appointed, but such a sale is ratified by their receiving their share of the purchase money after becoming of age. *Bogart* v. *Bogart*, 138 Mo. 419 (40 S. W. Rep. 91). A referee appointed to make a partition sale has no authority to convey any premises other than those described in the complaint and directed by the decree to be sold. His deed for other lands passes no title to the purchaser and the parties to the partition proceedings are not estopped from disputing it. *Heller* v. *Cohen*, 154 N. Y. 299 (48 N. E. Rep. 527). Where upon a bidder's refusal to pay his bid at a partition sale of devised real estate, the devisees arrange for the referee to convey to the purchaser, who conveys the land to them in lieu of money, they cannot subsequently impeach the action on the ground that the referee had no authority to make the deed without the receipt of the amount of the bid. *Gerke* v. *Cameron*, Cal. (50 Pac. Rep. 484).

Sec. 679. Statutes amended and new statutes. Cal. Code Civ. Proc., § 1772—powers of guardians—amended, Laws 1899, p. 285. Mo. Laws 1898, act Mar. 6th, repealing Rev. Stat., § 7175, is repealed by Laws 1899, p. 313. Neb. Code Civ. Proc., §§ 802, 839—who may have partition—contents of complaint—service upon defendants—amended, Laws 1899, p. 344. New Jersey has a new statute concerning partition, Laws 1898, pp. 644–668; and sundry acts relative to partition are repealed by Laws 1898, pp. 668–670. N. C. Code, § 1906—who is authorized to sell in partition proceedings—amended, Laws 1899, p. 281. A new statute in Virginia provides that "a lien creditor or any owner of undivided estate in real estate may also compel partition for the purpose of subjecting the estate of his debtor or the rents and profits thereof, to the satisfaction of his lien." Laws 1897–98, p. 488, amending Va. Code, § 2562, providing who may compel partition and what courts have jurisdiction of the action. Wis. Rev. Stat., § 3102, concerning complaint in partition has been amended and a new section (§ 3113a) in regard to the duties of commissioners in partitioning land has been added to the statute. Laws 1899, p. 613.

PARTNERSHIP REAL ESTATE.

EPITOME OF CASES.

Sec. 680. Dissolution of partnership by death of partner—Transfer of partnership real estate without a formal conveyance. Real estate held and used for partnership purposes is to be treated, upon the dissolution of the partnership by the death of one of its members, and for the purpose of closing up its business, the same as personal property; and a settlement of the firm business, made by the surviving partner and the administratrix of the deceased partner, with a view to discharging the partnership debts and winding up the partnership business, by the terms of which it was agreed that the partnership real estate should be retained by the survivor, and the title thereto should vest in him, will be upheld

when approved by the probate court in a proceeding to which the administratrix and the heirs of the deceased partner were parties. And in such case title to such real estate passes to the surviving partner under such settlement and its approval by the probate court, without any formal conveyance of the deceased partner's interest. *Sternberg* v. *Larkin*, 59 Kan. 201 (48 Pac. Rep. 861; 37 L. R. A. 195). Citing, *Woodward-Holmes Co.* v. *Nudd*, 58 Minn. 236 (59 N. W. Rep. 1010; 49 Am. St. Rep. 503; 27 L. R. A. 340).

Sec. 681. Miscellaneous notes. In Louisiana it is held that where immovable property belongs to a partnership, a mortgage by one of the partners, though using the firm name, will bind only his half of the property. *Baker* v. *Lee*, 49 La. 874 (21 So. Rep. 588). Particular real estate held not to be partnership propery. *Harris* v. *De Raismes*, N. J. Eq. (38 Atl. Rep. 687). Particular evidence held to show that a mine was operated under a lease by two persons. *Hodgson* v. *Fowler*, 24 Colo. 278 (50 Pac. Rep. 1084).

PARTY WALLS.

EPITOME OF CASES.

Sec. 682. Use of party walls—Cutting openings. One owning in common one-half of a party wall, which forms part of a building of his co-owner, is entitled to use the wall to its middle line as a support for a building erected by him in any manner he desires, so long as the wall is not thereby injured or weakened in respect to its use as a part of his co-owner's building. *McMinn* v. *Karter*, 116 Ala. 390 (22 So. Rep. 517). The cutting of openings in a party wall may be enjoined. *Weems* v. *Mayfield*, 75 Miss. 286 (22 So. Rep. 892). The court say: "A division wall is usually a solid wall, and by usage the words 'party wall' and 'division wall' have come to mean a solid wall. *Matts* v. *Hawkins*, 5 Taunt. 20 (1 E. C. L. 24); *Normille* v. *Gill*, 159 Mass. 427 (34 N. E. Rep. 543; 38 Am. St. Rep. 441); *Graves* v. *Smith*, 87 Ala. 450 (6 So. Rep. 308)."

Sec. 683. Contracts concerning party walls. Covenants in party wall contracts which stipulate that they are to bind the heirs and assigns, executors and administrators of the respective parties, run with the land, and all their benefits and burdens,—the liability to perform and the right to take advantage of them—both pass to the heir or assignee of the land to which the covenant is attached. *Kimm* v. *Griffin*, 67 Minn. 25 (69 N. W. Rep. 634; 64 Am. St. Rep. 385). Construing Ia. Code, §§ 2019, 2020, which prescribe the rights of adjoining owners of city or town lots in reference to the erection of party walls, and § 2030, which provides that the statute "shall not prevent adjoining proprietors from entering into special agremeents about walls on the lines between them, but no evidence of such agreement shall be competent unless it be in writing signed by the parties thereto or their lawfully authorized agents," it is held that the last section does not render void a parol contract which is the same as that the law made for the parties. *Swift* v. *Calnan*, 102 Ia. 206 (71 N. W. Rep. 288; 68 Am. St. Rep. 448; 37 L. R. A. 462).

Sec. 684. Statutes construed—Enforcing right to contribution. A statute (Ia. Code., §§ 2019, 2020), authorizing the owner of a city or town lot who is about to build contiguous to the land of his neighbor, to rest one-half of an 18-inch wall on his neighbor's land who may have the right to use the same by paying one-half of the cost thereof, after having been acquiesced in and enforced for more than 40 years, will not be held unconstitutional. *Swift* v. *Calnan*, 102 Ia. 206 (71 N. W. Rep. 288; 68 Am. St. Rep. 448; 37 L. R. A. 462). Under Pa. Act. Aprl 10, 1849, the right of compensation for the erection of a party wall passes to the purchaser of the premises upon which the wall has been erected unless stipulations to the contrary are made in the conveyance. *Voigt* v. *Wallace*, 179 Pa. St. 520 (36 Atl. Rep. 315). McClain's Ia. Code, § 3195, construed and applied—enforcing contribution for use of party wall by adjoining owner. *Gadmer* v. *Lent*, 102 Ia. 741 (70 N. W. Rep. 732).

PLATS AND SURVEYS.

EPITOME OF CASES.

Sec. 685. Miscellaneous notes. Where the plat of a subdivision of an addition to a city is based upon and refers to an older plat of such addition, such older plat will control where there is a conflict. *Bussee* v. *Town of Central Covington*, Ky. (38 S. W. Rep. 865). A map or plat of an addition to a town implies a previous survey and marking upon the ground, and one claiming under a deed describing the property conveyed by reference to such plat may show the existence of the stakes indicating the lines as marked by the surveyor. *Burke* v. *McCowen*, 115 Cal. 481 (47 Pac. Rep. 367). The conclusiveness of the statutory survey to establish a boundary between adjoining owners may be waived by them by agreement or by a new survey. *Spacy* v. *Evans*, Ind. (48 N. E. Rep. 855). The rule in surveying boundaries defined by streams or other waters is always to follow the stream or body of water crossing the mouth of affluents or other inlets from headland to headland. *City of Oakland* v. *Oakland Water-Front Co.*, 118 Cal. 160 (50 Pac. Rep. 277). Citing, *Tripp* v. *Spring*, 5 Sawy. 212 (Fed. Cas. No. 14,180); *Knight* v. *Association*, 142 U. S. 161 (12 Sup.Ct. Rep. 258). Where there has been a government survey of lands, while belonging to it, a resurvey of such lands must follow the boundaries and monuments as run by the original survey wherever it is possible to locate them. *Randall* v. *Burk Tp.*, 9 S. Dak. 534 (70 N. W. Rep. 837). While it may be within the province of the courts to correct the original United States surveys which have been upheld by the land department, yet before such correction can be made and the credit which is due to the surveys as established by field notes be overthrown, the mistake must be shown by clear and convincing testimony. *Blair* v. *Brown*, 17 Wash. 570 (50 Pac. Rep. 488). For an examination of particular evidence as to the applica-

bility of certain instructions where the correct location of a section corner was at issue, see *Woodbury* v. *Venia*, 114 Mich. 251 (72 N. W. Rep. 189). For construction of rules for determining the location of a group of surveys made in the name of the same warrantee, where only the exterior lines are given, see *Morrison* v. *Seamans*, 188 Pa. St. 74 (38 Atl. Rep. 710). For construction of particular surveys, see *Humphrey* v. *Cooper*, 188 Pa. St. 432 (38 Atl. Rep. 994); *Hitchcock* v. *Southern Iron & Timber Co.*, Tenn. (38 S. W. Rep. 588). Pennsylvania has a new statute concerning the recording of plats. Law 1899, p. 128. Although a statute (Mo. Rev. Stat. 1889 § 8320), authorizes the county surveyor to appoint deputies, the record of a survey made by a deputy surveyor is not admissible in evidence unless it purports to be made in the name of the principal. *Carter* v. *Hornback*, 139 Mo. 238 (40 S. W. Rep. 893). N. C. Code, § 2769, construed and applied—duty of surveyor to make two copies of the survey of an entry—showing mistake in survey. *Higdon* v. *Rice*, 119 N. C. 628 (26 S. E. Rep. 256). U. S. Rev. Stat., § 2395, applied—north and south line—rule when made on an assumed or wroug magnetic variation. *Taylor* v. *Fomby*, 116 Ala. 621 (22 So. Rep. 910).

POSSESSION.

EPITOME OF CASES.

Sec. 686. Possession as notice of rights or title. The holder of the legal title to land of which there is no actual occupancy, is presumed to be in possession thereof. *Troxell* v. *Johnson*, 52 Neb. 46 (71 N. W. Rep. 968). Actual possession of land is notice of the rights of the possessor therein. *Van Baalen* v. *Cotney*, 113 Mich. 202 (71 N. W. Rep. 491); *Jones* v. *Brenizer*, 70 Minn. 525 (73 N. W. Rep. 255); *First Nat. Bank* v. *Chafee*, 98 Wis. 42 (73 N. W. Rep. 318); *Stovall* v. *Judah*, 74 Miss. 747 (21 So. Rep. 614). A husband's occupancy of land is notice of an unrecorded deed thereof to him from his wife although such occupancy is but a continu-

ance of their previous possession. *Carr* v. *Brennan*, 166 Ill. 108 (47 N. E. Rep. 721; 57 Am. St. Rep. 119). The possession of a vendee under an unrecorded land contract is not notice of the rights of his vendor so as to protect a secret assignee of the latter as against a subsequent mortgage made by such vendor. *First Nat. Bank* v. *Chafee*, 98 Wis. 42 (78 N. W. Rep. 818). A grantor retaining possession after he has conveyed the legal title to another for the purpose of defrauding his creditors, is not entitled to the aid of the doctrine that possession is notice of the possessor's rights, as against a good faith mortgagee of his grantee. *Alliance Trust Co.* v. *O'Brien*, 32 Or. 333 (51 Pac. Rep. 640); Citing, *Exon.* v *Danck*, 24 Or. 110 (32 Pac. Rep. 1045); *Bank* v. *Batty*, 30 N. J. Eq. 126. In Tennessee it is held upon an exhaustive review of the authorities, that the continued possession of a grantor after the execution of an absolute conveyance, which is duly recorded, is not notice of any adverse claim of title by him. *Curry* v. *Williams*, Tenn. (38 S. W. Rep. 278). Citing, *Van Keuren* v. *Railroad Co.*, 38 N. J. L. 165; *Bloomer* v. *Henderson*, 8 Mich. 395 (77 Am. Dec. 453); *Scott* v. *Gallagher*, 14 Serg. & R. 333 (16 Am. Dec. 508); *Newhall* v. *Pierce*, 5 Pick, 450; *Lodge* v. *Simonton*, 2 Penrose & W. 439 (23 Am. Dec. 86 and full note); *Koon* v. *Tramel*, 71 Ia. 181 (32 N. W. Rep. 243); *May* v. *Sturdivant*, 75 Ia. 116 (39 N. W. Rep. 221; 9 Am. St. Rep. 468).

POWER OF ATTORNEY.

EPITOME OF CASES.

Sec. 687. Authority conferred by power of attorney. A general power to sell and convey real estate, does not authorize the person acting thereunder to make a dedication of it for public purposes. *Anderson* v. *Bigelow*, 16 Wash. 198 (47 Pac. Rep. 426). A provision in a power of attorney authorizing him "to sell, transfer, and release two certain mortgages executed by Gotthard Kunz (describing them); to indorse and transfer the notes secured by said motgages; to sell and transfer my

claims for said notes and mortgages filed in the superior court of said San Luis Obispo county, state of California, in the matter of the estate of said Gotthard Kunz, now deceased; and to receive payment of said claims, and give acquittances therefor," is held to confer on him power to sell and transfer the title to the securities absolutely or to collect them, but does not confer power to pledge them. *Hawxhurst* v. *Rathgeb*, 119 Cal. 581 (51 Pac. Rep. 846; 63 Am. St. Rep. 142). Where a husband and his wife, as such wife, joined in a power whereby they authorized and empowered one L., as their attorney in fact, among other things, to grant, bargain, sell, and convey all pieces or parcels of land which they then owned, or might thereafter acquire or become seised of, "or which they may now or hereafter be in any way interested," it is held that under this power the attorney was authorized and empowered to convey a tract of land thereafter acquired by the husband as a soldier's additional homestead, and to bar the wife's inchoate dower right, provided for in Rev. Stat. 1866, ch. 48. *Snell* v. *Weyerhauser*, 71 Minn. 57 (73 N. W. Rep. 633). Citing, *Tuman* v. *Pillsbury*, 60 Minn. 520 (63 N. W. Rep. 104).

Sec. 688. Revocation of power of attorney. The death of the maker of a power of attorney revokes the power and a conveyance subsequently executed by the attorney is void. *Tuttle* v. *Green*, Ariz. (48 Pac. Rep. 1009). Where a power of attorney is coupled with an interest or where it is given for a valuable consideration, unless there is an express stipulation that it shall be revocable, it is from its character, in contemplation of law, irrevocable, whether the terms expressly making it so are expressed in it or not. *Muotague* v. *McCarroll*, 15 Utah 318 (49 Pac. Rep. 418).

STATUTORY PROVISIONS.

[In Vol. IV, §§ 591–632; Vol. V, §§ 644–651, will be found a compilation of the statutory provisions of the several states and territories concerning powers of attorney. Below we give such amendments, changes and additional constructions as have been made.]

Sec. 689. New Jersey. (See Vol. IV, § 616; Vol, V. § 648.) A married woman, her husband joining with her, may execute a power of attorney for the conveyance of her land or release of dower. N. J. Laws 1898, p. 685, § 40.

Sec. 690. North Carolina. (See Vol. IV § 619.) Code, § 1249. has been amended so as to read as follows: "Every power of attorney, wherever made or concerning whatsoever matter, may on acknowledgment or proof of the same before any competent official, be registered in the county wherein the property or estate which it concerns is situate, if such power of attorney relate to the conveyance thereof; if it does not relate to the conveyance of any estate or property then in the county in which the attorney resides or the business is to be transacted." Laws 1899, ch. 235, § 15.

PUBLIC LANDS.

EPITOME OF CASES.

Sec. 691. Indians and public lands. The grant of lands by Act of Congress, May 28, 1830, to the Cherokee Nation providing that "the lands hereby granted shall revert to the United States if the Cherokee Nation become extinct or abandon the same," is held to create a base, qualified, or determinable fee without the right of reversion, but only a possibility of reversion in the United States. *Cherokee Strip Live-Stock Ass'n* v. *Cass Land & C. Co.*, 188 Mo. 394 (40 S. W. Rep. 107). Conceding that land entered with Sioux half-breed scrip issued under the act of congress of July 17, 1854 (which is not assignable), becomes the absolute property of the scripee, unaffected by any prior deed contract or act of the scripee, yet as soon as it is located the land is subject to alienation or other disposition by him, and the title may be affected or lost by his subsequent conduct, the same as if it had been acquired in any other way. While the acts of the scripee before the location of the scrip may not be resorted to as original evidence of laches or estoppel by conduct, they may be considered for the purpose of characterizing his subsequent conduct. *Coursolle* v. *Weyerhauser*, 69 Minn. 328 (72 N.W. Rep. 697). Where lands are held under a treaty with the Indians (7 Stat. at Large, 320) which stipulates that grantees cannot convey except by consent of the president of the United States, it is held that conveyances executed by such grantees take effect and have priority from the time of the approval thereof by the president, irrespective of the recording laws of

the state where the land is situated; and where the land has been partitioned among the grantees by a proceeding in court a subsequent approval and a deed made by one, of his share as determined in partition, operates as a recognition and approval of the proceedings in partition. *Lomax* v. *Pickering*, 165 Ill. 481 (46 N. E. Rep. 288). Under the treaty stipulations between the United States government and the Osage Indians they occupy their reservation under the express sanction and authority of the United States; and as long as the tribal relations continue to exist, and until such time as the government shall, by its own volition, cease control and supervision over such tribe, the fact that the government may have issued a patent to the Indians for lands embraced within their reservation does not take such reservation out of the prohibition contained in the act of Congress of June 4, 1888 (25 Stat. 166), making it a criminal offense to cut timber standing upon any Indian reservation. *Labadie* v. *United States*, 6 Okla. 400 (51 Pac. Rep. 666). U. S. Rev. Stat., §§ 2108, 2116, construed and applied—validity of lease of land in Indian Territory by the Cherokee Nation. *Cherokee Strip Live-Stock Ass'n* v. *Cass Land & C. Co.*, 138 Mo. 394 (40 S.W. Rep. 107). A deed of lands in New York, executed by the Indians in 1600, conferred no title on the grantee. *Trustee of Town of Easthampton* v. *Vail*, 151 N. Y. 468 (45 N. E. Rep. 1030). As to the right of an officer to enter upon an Indian reservation to levy an execution upon personal property of one not an Indian residing thereon, see *Stiff* v. *McLaughlin*, 19 Mont. 300 (48 Pac. Rep. 232).

Sec. 692. Power of land department—Cancellation of entry or patent. The land department has no power to cancel an entry for fraud or because the lands entered were not subject to entry without giving the entryman notice and a hearing. *Delles* v. *Second Nat. Bank*, Wyo. (50 Pac. Rep. 190). The commissioner of the general land office has power, after the issue to an entryman of a final receipt, and before patent, to order an investigation, and, if it be thereupon found that the entry or proof was fraudulent, to cancel the entry. While such power is not unlimited, or to be exercised arbitrarily, and is in some cases, at least, subject

to judicial review, as where the opportunity to be heard was not accorded the claimant, still even in such cases the claimant seeking relief in the courts assumes the burden of showing that he has in fact earned a patent. The act of congress of March 8, 1891, protecting certain innocent purchasers and incumbrancers against cancellations of entries, refers only to entries in force when the act was passed, and not to those which had been previously cancelled. *Pfund* v. *Valley Loan & T. Co.*, 52 Neb. 473 (72 N. W. Rep. 480).

After a patent has been duly issued by the land department, although its delivery is not shown, an attempted cancellation of it by such department at the request of the patentee claiming that it embraced the wrong land, is void. *Miller* v. *Donahue*, 96 Wis. 498 (71 N. W. Rep. 900). The court cites *United States* v. *Schurz*, 102 U. S. 378, from which it quotes approvingly as follows: "From the very nature of the functions performed by those officers, and from the fact that a transfer of the title from the United States to another owner follows their favorable action, it must result that, at some stage or other of the proceedings, their authority in the matter ceases. It is equally clear that this period is, at the latest, precisely when the last act in the series essential to the transfer has been performed; or so to speak, in technical language, the legal title has passed from the government, and the power of these officers to deal with it has passed away. The fact that the evidence of this transfer of title remains in the possession of the land officers cannot restore the title to the United States, or defeat that of the grantee, any more than the burning up of a man's title deeds destroys his title. * * The acts of congress provide for the recording of all patents for land in one office, and in books for that purpose. An officer called the 'recorder' is appointed to make and keep the records. He is required to record every patent before it is issued, and to countersign the instrument to be delivered to the grantee. This, then, is the final record of the transaction, the legally prescribed act which completes what Blackstone calls 'title by record;' and, when this is done, the grantee is invested with title; * * * that when all we have mentioned has been consciously and purposely done by each officer engaged in it, and when these

officers have been acting within the scope of their duties, the legal title to the land passes to the grantee, and with it the right to the possession of the patent. No further authority to consider the patentee's case remains in the land office,—no right to consider whether he ought in equity, or on new information, to have the title or to receive the patent. There remains the duty, simply ministerial, to deliver the patent to the owner."

Sec. 693. Conclusiveness of decisions of land department. Where two parties are contesting before the United States land department for a tract of government land,and the final decision is had in favor of one of such parties,the successful party may institute an action in the district court for an injunction to have his adversary enjoined from further interfering with his possession of the premises; and in such cause the court may properly award an injunction which prevents the unsuccessful party in the contest proceedings from further occupancy of the disputed premises. McAtee, J., dissenting. *Barnes* v. *Newton*, 5 Okla. 428 (48 Pac. Rep. 190; 49 Pac. Rep. 1074). In the officers of the interior department is vested the judgment and discretion of determining, when applications for public lands are presented, whether the lands applied for are public lands, open to settlement, or whether they are Indian lands, or whether, for any other reason, they are not open to settlement; and the determination of this question will not be interfered with by the courts, by injunction, in behalf of a homestead applicant, prior to the time the question has gone beyond the control of the interior department by the disposal of the lands and their becoming the subject of private instead of governmental ownership. *Wilbourne* v. *Baldwin*, 5 Okla. 265 (47 Pac. Rep. 1045). Where a proceeding is brought in a court of equity for the purpose of declaring the holder of the legal title to a tract of land entered under the provisions of the homestead law of the United States a trustee for the benefit of one who claims a superior title in equity, the facts as found by the land department will be accepted as conclusive by the court. *Calhoun* v. *Violet*, 4 Okla. 321 (47 Pac. Rep. 479). The clerical act of issuing a patent by inadvertence and mistake, cannot be regarded as a decision within

the rule as to the review by courts of the decisions of the land department. *Roy* v. *Duluth & I. R. R. Co.*, 69 Minn. 547 (72 N. W. Rep. 794).

Sec. 694. School lands—Statutes construed. Kan. Gen. Stat. 1889, par. 5782, construed and applied—forfeiture of school land purchase—notice to assignee—sufficiency of proof and service. *Oberlin Loan, T. & Banking Co.* v. *Flinn*, 58 Kan. 88 (48 Pac. Rep. 560); *Knott* v. *Tade*, 58 Kan. 94 (48 Pac. Rep. 561). S. Dak. Laws 1890, ch. 140, construed and applied—cutting and removing timber from school lands as a crime—sufficiency of indictment and proof *State* v. *Dorman*, 9 S. Dak. 528 (70 N. W. Rep. 848). Tex. Gen. Laws 1879, p. 25; Gen. Laws 1881, p. 119, construed and applied—sale of school lands—power of commissioner of land department. *Rogers* v. *Concho Cattle Co.*, 90 Tex. 555 (39 S. W. Rep. 1081). W. Va. Code, ch. 105, as amended by Laws 1893, ch. 24, applied—sale of land for school fund. *Yokum* v. *Snyder*, 42 W. Va. 857 (26 S. E. Rep. 181).

Sec. 695. Mining claims—Location and relocation—Marking boundaries. The location of a mining claim is void when its discovery point is placed within an existing valid claim. *Watson* v. *Mayberry*, 15 Utah 265 (49 Pac. Rep. 479). Under U. S. Rev. Stat., § 2320, "no location of a mining claim shall be made until a discovery of the vein or lode within the limits of the claim located." *Willeford* v. *Bell*, Cal. (49 Pac. Rep. 6). Cal. Stat. 1891, p. 219, which provides for filing by the owner of a mining claim with the county recorder of deeds of the county in which the mine is situated an affidavit describing the labor performed or improvements made by him and their value, when such improvements or labor are required for location or ownership of the mine, within thirty days after the time limited for performing such labor or making such improvements, and that upon failure to do so the mine shall be open to relocation, does not allow of relocation within the thirty days. *Harris* v. *Kellog*, 117 Cal. 484 (49 Pac. Rep. 708). Particular evidence held to show a valid location of a mining claim. *Adams* v. *Crawford*, 116 Cal. 495 (48 Pac. Rep. 488). Construing

Mills' Ann. Colo. Stat., § 3149, providing that the width of lode claims located in certain counties shall be seventy-five feet on each side of the center of the vein or crevice, it is held that while the claim may not be more than 150 feet wide neither side line may be distant from the vein or discovery shaft, more, though it may be less than seventy-five feet. *Taylor* v. *Parenteau*, 28 Colo. 368 (48 Pac. Rep. 505). Mills' Ann. Colo. Stat., § 3153; Gen. Stat. 1883, § 2402, construed and applied—location of mining claim by setting posts at the corners thereof. *Taylor* v. *Parenteau*, 28 Colo. 368 (48 Pac. Rep. 505). U. S. Rev. Stat., §§ 2320, 2324, applied—marking of location on the ground—proof of posting notices. *Willeford* v. *Bell*, Cal. (49 Pac. Rep. 6). A discovery notice which describes the claim as joining and being bounded by three other claims on three sides thereof, sufficiently locates the claim with reference to permanent monuments. *Riste* v. *Morton*, 20 Mont. 139 (49 Pac. Rep. 656).

Sec. 696. **Mining claims—Doing required amount of work.** Construing U. S. Rev. Stat., § 2324, requiring an annual expenditure of not less than $100 worth of labor on a mining claim and providing that "Upon the failure of any one of several co-owners to contribute his proportion of the expenditures required thereby, the co-owners who have performed the labor or made the improvements may, at the expiration of the year, give such delinquent co-owner personal notice in writing or notice by publication in the newspaper published nearest the claim, for at least once a week for ninety days, and if at the expiration of ninety days after such notice in writing or by publication such delinquent shall fail or refuse to contribute his portion of the expenditure required by this section, his interest in the claim shall become the property of his co-owners who may have made the required expenditures," it is held that as against a deceased delinquent owner having no administrator, a notice addressed to him, "his heirs, administrators and to all whom it may concern," without individually naming the heirs, is sufficient; a notice may be published or served personally, and the delinquencies for several years may be grouped in one notice. *Elder* v. *Horseshoe Min. & Milling Co.*, 9 S. Dak. 686 (70 N. W. Rep.

1060; 62 Am. St. Rep. 895). One seeking to enforce a forfeiture under this statute has the burden of proof and he must establish the facts constituting the forfeiture by clear and convincing proof. *Axion Min. Co.* v. *White*, 10 S. Dak. 198 (72 N. W. Rep. 462); *Dibble* v. *Castle Chief Gold Min. Co.*, 9 S. Dak. 618 (70 N. W. Rep. 1055). The facts constituting the grounds of forfeiture of one's interest in a mining claim on account of his failure to contribute his share of work and expense, under U. S Rev. Stat., § 2324, need not appear of record. *Riste* v. *Morton*, 20 Mont. 189 (49 Pac. Rep. 656). Particular evidence examined and held insufficient to support a finding of forfeiture of the location of a mining claim for failure to do representation work. *Strasburger* v. *Beecher*, 20 Mont. 143 (49 Pac. Rep. 740). Utah Laws 1897, ch. 86, providing "the manner of locating and recording quartz and placer mining claims," is not unconstitutional on the ground that it expresses more than one subject in its title; nor does the statute conflict with U. S. Rev. Stat., § 2324, authorizing mining districts to make regulations not inconsistent with the laws of the United States or the laws of the state or territory in which a district is situated, governing the location, manner of recording, and the amount of work necessary to hold possession of mining claims. *In re Monk*, 16 Utah 100 (50 Pac. Rep 810).

Sec. 697. Mining claims—Abandonment by locator. After a valid location has been made, the locator need not keep an actual possession of the claim; his right to possession will continue until he has in fact abandoned, or has forfeited it for failure to do the requisite amount of work within the prescribed time, and the burden of proving such forfeiture or abandonment is on him who would attack this right. *Harris* v. *Kellog*, 117 Cal. 484 (49 Pac. Rep. 708). Abandonment cannot be charged against the locator of a claim, if, while he is in possession, his claim has been seized by another who holds possession of it adversely to him. Abandonment is a question of act as well as intent, and it is also said that it is a question of mixed law and fact. A party's own testimony that he had not intended to abandon is not conclusive upon the jury. The intention to abandon must be determined by

the jury from all the facts and circumstances in the case. *Lockhart* v. *Wills*, N. M. (50 Pac. Rep. 818).

Sec. 698. Mining claims—Conflicting locations—Adversary proceedings. A patent to a mining claim which conveys only a portion of the surface location on account of excepting a previous conflicting claim, is void in so far as it attempts to convey the lode on its strike independently of the granted surface. *Montana Ore-Purchasing Co.* v. *Boston & M. C. C. & S. M. Co.*, 20 Mont. 336 (51 Pac. Rep. 159). A patent for a mining claim carries with it the right to the surface territory described therein, together with all lodes or veins having their tops or apices within such surface boundaries, except, perhaps, cross lodes. Hence, while the adverse claimant may, to prevent entry, show that the vein relied upon by his adversary departs from the side lines of the claim, he cannot for this reason invalidate a patent after the same has once been issued. *Argonaut Consol. Min. & Mill. Co.* v. *Turner*, 23 Colo. 400 (48 Pac. Rep. 685; 58 Am. St. Rep. 245). The *prima facie* presumption that a lode whose course and strike are substantially parallel with, and run in the same direction as the side lines, continues in the same direction throughout the length of the claim, obtains not only in contests over surface rights, but also where extralateral rights are involved. *Wakeman* v. *Norton*, 24 Colo. 192 (49 Pac. Rep. 283). Construing U. S. Rev. Stat., § 2326, it is held that the statute does not provide what form of action shall be brought, yet when it appears that the object of the suit is to adverse the party applying for a United States patent, it is necessary for the plaintiff to both allege and prove that he is a citizen of the United States, or has declared his intention to become such; each party is to establish his right to the mining grant in controversy against the United States, as well as against his adversary; the party filing the contest should allege and prove every step necessary to establish his right to his mining claim that would be required in the land office for a patent, with the exception of advertisement and certificate of surveyor general as to amount of work required before patent can be obtained; and if the proof shows no title or that all the requirements of the law have not been complied with, he can recover no judg-

ment. *Schultz* v. *Allyn*, Ariz. (48 Pac. Rep. 960). The provisions of this statute do not apply to an action to recover possession of a mining claim so as to require the plaintiff to allege his citizenship in his complaint, but if his title rests upon a location under the United States Laws, to sustain it, he must make proof of citizenship as required by the statute. *Harris* v. *Kellogg*, 117 Cal. 484 (49 Pac. Rep. 708).

Sec. 699. Mining claims—Following "dip" of vein. Construing and applying U. S. Rev. Stat., § 2322, which confines the right of the owner of the apex of a mining vein to follow its dip, to such portions as lie between vertical plains drawn downward through the end lines of the location, it is held that the side lines of a claim will be treated as end lines where a vein enters on one side of the claim and passes out on the same side and does not run approximately parallel to the side line. *Catron* v. *Old*, 23 Colo. 433 (48 Pac. Rep. 687; 58 Am. St. Rep. 256). See opinion for collation of authorities on this subject. In the case of *Wakeman* v. *Norton*, 24 Colo. 192 (49 Pac. Rep. 283), the supreme court of Colorado say: "While it is true that the locator of a mining claim takes it subject to the right of others to follow and take ore from any vein on its dip through his ground the top or apex of which is included within another valid lode location, yet we think he is entitled to the presumption that what is contained within its surface boundaries is his, until the conditions upon which such extralateral right depends are shown to exist, by the one who seeks to avail himself of such right. In *Mining Co.* v. *Fitzgerald*, 4 Morr. Min. Rep. 380 (Fed. Cas. No. 8,158), Judge Hallett thus concisely states what we believe to be the correct rule in such cases: 'Within the lines of each location, the owner shall be regarded as having full right to all that may be found, until some one can show a clear title to it as part of some lode or vein having its top and apex in other territory. To state the proposition in other words, we say that there is a presumption of ownership in every locator as to the territory covered by his location, and, within his own lines, he shall be regarded as the owner of all valuable deposits, until some one shall show by preponderance of testimony that such deposits

belong to another lode having its top and apex elsewhere." To the same effect are *Doe* v. *Mining Co.*, 54 Fed. Rep. 935; *Consolidated Wyoming Gold Min. Co.* v. *Champion Min. Co.*, 63 Fed. Rep. 540; *Duggan* v. *Davey*, 4 Dak. 110 (26 N. W. Rep. 887); *Cheezman* v. *Shreve*, 16 Morr. Min. Rep. 79 (37 Fed. Rep. 36); *Iron Silver Min. Co.* v. *Elgin Min. & Smelting Co.*, 118 U. S. 196 (6 Sup. Ct. Rep. 1177); *Iron Silver Min. Co.* v. *Campbell*, 17 Colo. 267 (29 Pac. Rep. 513)."

Sec. 700. Construction of statute excepting "known" vein or lode from placer patent. In the case *Casey* v. *Thieviege*, 19 Mont. 341 (48 Pac. Rep. 394; 61 Am. St. Rep 511), the supreme court of Montana, in construing U. S. Rev. Stat., § 2333, follow the case of *Migeon* v. *Railway Co.*, 23 C. C. A. 163 (77 Fed. Rep. 256), from which the court quotes with approval as follows: "This section (2333) of the statute was primarily intended for the benefit and protection of the locators of placer claims. If a lode is known to exist within the boundaries of a placer claim, the applicant for a patent must state that fact, and then, by paying $5 an acre for that portion of the ground and $2.50 for the balance, a patent will issue to him, covering both the lode and placer ground; but, if the lode is known to exist, and is not included in the application for a patent, then it will be construed as a conclusive declaration that the owner of the placer claim has no right of possession by virtue of his patent for the placer ground to the vein or lode. It matters not whether there is a lode or vein actually within the limits, which subsequent developments may prove; if it is not known to exist at the time of the application, the patent for the placer claim will include such lode or vein. In such cases the supreme court has repeatedly declared that it is not enough that there may have been some indications, by outcropping on the surface, of the existence of lodes or veins of rock in places bearing gold or silver or other precious metals to justify their designition as 'known veins or lodes;' that, in order to meet that designation, the lodes or veins must be clearly ascertained, and be of such extent as to render the land more valuable on that account, and justify their exploitation. *Mining Co.* v. *Reynolds*, 124 U. S. 374, 388 (8 Sup. Ct. Rep. 598, 603); *U. S.* v. *Iron Silver Min.*

Co., 128 U. S. 674, 683 (9 Sup. Ct. Rep. 195, 199); *Iron Silver Min. Co.* v. *Mike & Starr Gold & Silver Min. Co.*, 143 U. S. 394, 404, 424 (12 Sup. Ct. Rep. 543, 545, 553); *Sullivan* v. *Mining Co.*, 143 U. S. 431 (12 Sup. Ct. Rep. 555); *Brownfield* v. *Bier*, 15 Mont. 403 (39 Pac. Rep. 461), and other authorities there cited."

Sec. 701. Mining claims—Miscellaneous notes. There is no statute prohibiting one who has made a valid location of a mining claim, but who has not received his patent, from giving to another a bond for title to a part of the claim in order to settle a dispute between them concerning conflicting locations. *Montana Min. Co.* v. *St. Louis Min. & Mill. Co.*, 20 Mont. 394 (51 Pac. Rep. 824). Particular evidence held to show a sufficient *prima facie* title, to entitle one to maintain an action for the value of ore alleged to have been wrongfully taken from his mining claim. *Wakeman* v. *Norton*, 24 Colo. 192 (49 Pac. Rep. 283). Const. Choctaw Nation, art. 7, § 18, construed and applied—extent to which discoverer of mine can work it. *McCurtain* v. *Grady*, Ind. Ter. (38 S. W. Rep. 65).

Sec. 702. Mining claims—Statutes amended and new statutes. Cal. Laws 1897, act Mar. 27th, prescribing manner of locating mining claims, is repealed by Laws 1899, p. 148. Ida. Laws 1899, pp. 237–240, makes general provisions concerning the location and working of mining claims, amends Rev. Stat., §§ 3100, 3101, 3103–3105, and repeals §§ 3102, 3120–3122. For amendment of this statute, see Laws 1899, p. 440. Nev. Laws 1897, act Mar. 16th, §§ 2, 13, 14,—location and relocation of mining claims—amended and new sections added, Laws 1899, p. 93. S. Dak. Comp. Laws, § 1999—location of mining claim—recording claim—amended, Laws 1899, p. 146. S. Dak. Comp. Laws, §§ 1998, 2001, 2003—amount of work to be done before filing location certificate—amended, Laws 1899, p. 148. Utah has a new statute regulating the manner of locating and recording mining claims, and Rev. Stat., §§ 990, 1495–1506, 1537 are repealed. Laws 1899, pp. 26–30. Washington has a new statute regulating the manner of locating and holding mining claims. Laws 1899, p. 69.

Sec. 703. Swamp and tide lands — Miscellaneous notes. Act Cong. Sept 28, 1850, granting swamp and overflowed lands to the states, was a grant in *praesenti*, and the act of the general assembly of Iowa, 1858, vested the title in the same manner in the respective counties. *Smith* v *Miller*, 105 Ia. 688 (70 N. W. Rep. 128). The act of Congress, Sept. 28, 1850, granting swamp lands to the states is construed to be a grant to the state with full power to dispose of the land and to make application of the proceeds so far as necessary to secure the object specified. No person except the United States can question the disposal made of these lands or their proceeds made by the legislatures of the several states *Kings Co.* v. *Tulare Co.*, 119 Cal. 509 (51 Pac. Rep. 866) Citing, *American Emigrant Co.* v. *Adams Co.*, 100 U. S. 61 *Mills Co.* v. *Burlington & M. R. Co.*, 107 U. S. 557 (2 Sup. Ct. Rep. 654); *Hager* v. *Reclamation Dist.*, 111 U. S. 701 (4 Sup. Ct. Rep. 663); *U. S.* v. *Louisiana*, 127 U. S. 182 (8 Sup. Ct. Rep. 1047). Cal. Stat. 1855, p. 189; Stat. 1858, p. 198; Stat. 1868, p. 507; Stat. 1873–74, p. 770; Stat. 1891, p. 243, construed and applied—sale of swamp and overflowed lands—custody and ownership of funds. *Kings Co.* v. *Tulare Co.*, 119 Cal. 509 (51 Pac. Rep. 866). Mo. Rev. Stat. 1889, §§ 2398, 6515, construed and applied—sale of swamp lands by county—validity of commissioner's deed. *Hall* v. *Gregg*, 138 Mo. 286 (39 S. W. Rep. 804). Where an application to purchase tide lands is amended so as to meet the objections on account of which the land commissioner rejected it, the amended application should be considered as relating back to the time when the application was first tendered. *Johnson* v. *Woodworth*, 18 Wash. 243 (51 Pac. Rep. 375). Cal. Act, April 4, 1870, amending Stat. 1867–68, p. 507, so as to exclude from its operations all the swamp and tide lands within two miles of "any town or village," applies to cities. *Klauber* v. *Higgins*, 117 Cal. 451 (49 Pac. Rep. 466). Wash. Laws 1895, p. 549, §§ 52, 65, 70, construed and applied—sale of tide lands —rights of first applicant and occupant of improved lands. *Oliver* v. *Dupee*, 16 Wash. 634 (48 Pac. Rep. 351). Wash. Laws 1895, p. 561, § 82, construed and applied — right of applicant to purchase tide lands to appeal from decision of land commissioners; Wash. Const., art. 15, § 3; Laws 1895,

p. 550, § 54, construed and applied—rights of municipal corporations to locate and extend their streets over tide lands. *Town of Ilwaco* v. *Ilwaco Ry. & Nav. Co.*, 17 Wash. 652 (50 Pac. Rep. 572).

Sec. 704. Town site lands—Miscellaneous notes. Under the town site act, the probate jndge holds the legal title to the bed of a non-navigable stream, and where such a stream is named as a monument in a conveyance by him, the grant extends to the center of the thread of the stream as the true boundary. *Hanlon* v. *Hobson*, 24 Colo. 284 (51 Pac. Rep. 433). One claiming under a deed referring to a map of a town, the streets, lanes, avenues and alleys marked on which had been previously conveyed to the town by a probate judge, cannot assail the authority of such judge to make his deed. where he was not an occupant of the land at the time the the town site was entered and had never succeeded to the right of an occupant at that time. *Laughlin* v. *City of Denver*, 24 Colo. 255 (50 Pac. Rep. 917). Particular case in which title claimed under a conveyance by a probate judge as a town site, is held to prevail over a void tax deed. *Marysville Inv. Co.* v. *Holle*, 58 Kan. 778 (51 Pac. Rep. 281). Town site trustees appointed under the act of Congress of May 14, 1890, had no power to execute a deed to undisposed-of lots in a town site to the city, for public use as a site for public buildings, while applications of persons for deeds by virtue of occupancy were pending; and where it appears that a deed was made while an appeal was pending from a decision of the town site trustees adverse to the applicants, and before the final decision in the case was made by the secretary of the interior, and prior to an order of the secretary of the interior, or any action tantamount thereto, setting aside the lots for public use as a site for public buildings, a deed to the lots made by the trustees to the city for such purpose is *held* void. Under the provision of the town site law which allows a city to acquire undisposed of lots for public use as sites for public buildings, the city acquires no right to the use and occupancy of the lots until the secretary of the interior has directed that the lots be reserved for such purpose for the city, or has executed a proper conveyance, or

directed it to be executed by the town site trustees, to the city for such purpose. The right of a city to use and occupy lots in a government town site attaches from the time the secretary of the interior directs that the lots be set apart or reserved for public use as sites for public buildings of the city; and it is *held* that rents as damages, by an occupant thereof unlawfully dispossessed by the city could only be recovered to the time of the secretary's order that the lots be reserved for such public use, and not to the time the city received the trustees' deed to the lots, made in pursuance to such order. *City of Oklahoma City* v. *Hill*, 6 Okla. 114 (50 Pac. Rep. 242).

Sec. 705. Grants to railroads — Miscellaneous notes. A railroad company may acquire a right of way under Act of Congress, March 3, 1875, over lands which the Great and Little Osage Indians ceded to the United States by the second article of the treaty concluded Sept. 29, 1865. *Rierson* v. *St. Louis & S. F. Ry. Co.*, 59 Kan. 32 (51 Pac. Rep. 901). Where lands granted as a right of way to a railroad under this statute embrace lands to which another has made an incomplete homestead entry, the grant to the company from the government operates as a donation of all its interests in the lands embraced in the grant upon the approval of the articles of incorporation and map of definite location subject to the contingency of the homestead claimant perfecting his title; and, if he fail to do this, immediately upon his abandonment a perfect title accrues to the railroad company, as against the United States and any person who had not then a possessory right to such lands. After such abandonment a third party cannot make a homestead entry on such lands. *Alexander* v. *Kansas City, Ft. S. & M. R. Co.*, 138 Mo. 464 (40 S. W. Rep. 104). The grant of lands to the state of Missouri by Act Congress Feb. 9, 1853 (10 Stat. 155), is construed as a grant in *praesenti*, giving the state absolute power to sell the lands acquired thereunder, and a railroad company to whom lands has been conveyed under Mo. Laws 1855, p. 314, may mortgage such lands to the state to secure the payment of its construction bonds. Mo. Laws 1856–57, p. 85, construed and applied. *Wilson* v. *Beckwith*, 140 Mo. 359 (41 S. W. Rep. 895). 18 U. S. Stat. 482, pt. 3, construed and

applied—location of railroad right of way upon public lands —filing by the railroad company of its articles of incorporation and profile of its road. *Rio Grande W. Ry.* Co. v. *Telluride Power-Trans. Co.*, 16 Utah 125 (51 Pac. Rep. 146). Lands lying beyond the tier of townships adjoining those through which the right of way of a railroad runs, are not "adjacent" within the meaning of an act of congress granting such right of way and giving the company permission to take from the public lands adjacent thereto, stones, earth, water and other materials required for the construction of the railway. Hamilton, J., dissenting. *United States* v. *Bacheldore*, N. M. (48 Pac. Rep. 810). Tex. Const., art. 10, § 6; Laws 1870, Act. Aug. 15, construed and applied—right of the Houston & Texas Central Ry. Co. to land grant, *Houston & T. C. Ry. Co.* v. *State*, 90 Tex. 607 (40 S. W. Rep. 402). Tex. Laws 1882, Act April 22, construed and applied—repeal of statutes granting lands to railroads—legislative power. *Thompson* v. *Baker*, 90 Tex. 168 (38 S. W. Rep. 21).

Sec. 706. Preemption of public lands for homestead. In order for lands to be exempt from preemption on account of there being situated thereon known salines or minerals, under U. S. Rev. Stat., § 2258, the existence of such salines or minerals must be known at the time of the entry. *United States* v. *Blackburn*, Ariz. (48 Pac. Rep. 904). Following the rule that the right given by U. S. Rev. Stat., § 2306, to a soldier who had theretofore entered under the homestead laws less than 160 acres of land, to enter enough more to make up 160 acres, is assignable before entry, it is held that a soldier entitled to enter land under this statute may confer the right on another for a valuable consideration by the execution of an irrevocable power of attorney. *Montague* v. *McCarroll*, 15 Utah 318 (49 Pac. Rep. 418). The provision of § 18, act of Congress, March 2, 1889 (25 Stat. 1005), "That * * * until said lands are open to settlement by proclamation of the president no person shall be permitted to enter upon and occupy the same, and no person violating this provision shall ever be permitted to enter any of such lands, or acquire any rights thereto,"—is applicable to honorably discharged Union soldiers to the same extent as it is to all other

citizens. *Calhoun* v. *Violet*, 4 Okla. 321 (47 Pac. Rep. 479). It is held that one who made an entry in violation of this statute and acquired peacable possession of public lands can maintain an action of trespass against one unlawfully dispossessing him. *City of Oklahoma City* v. *Hill*, 6 Okla. 114 (50 Pac. Rep. 242). A settler who has entered public lands, has from such entry, an inchoate title, which is, in a legal sense, property, and subject to defeat only by his failure to comply with the conditions imposed by the act of Congress; such title will support an action by him for trespass committed after entry and before his right to a patent becomes absolute. *Culbertson Irr. & Water-Power Co.* v. *Olander*, 51 Neb. 539 (71 N. W. Rep. 298). A qualified homesteader who has settled upon a quarter section of the public lands and done all in his power to secure the land as his homestead and applied or tendered compliance with all of the provisions of the homestead law, necessary to complete his title to the land, and who has failed to acquire the legal title through no fault of his own, but through the wrongful actions of the land officers, has a prior equitable claim to the land, superior to the claim of the state and its grantees, who held the naked title with notice of his equities by reason of the fact that the land department had, by mistake and inadvertence, issued a patent to the land to the state. *Roy* v. *Duluth & I. R. R. Co.*, 69 Minn. 547 (72 N. W. Rep. 794). Act Congress, June 16, 1880 (1 Supp. Rev. Stat., p. 565), construed and applied—cancellation of entry—rights and remedies of entrymen. *United States* v. *Foreman*, 5 Okla. 237 (48 Pac. Rep. 92). 25 U. S. Stat., 1005; 27 U. S. Stat., 642, construed and applied—second homestead entry in the Cherokee outlet—occupation by claimants pending contest. *Clack* v. *Diehl*, 5 Okla. 148 (48 Pac. Rep. 178).

Sec. 707. Conveyance of homestead lands. When a homestead entryman has complied with all of the requirements of the federal statutes applicable to the disposal of the tract of land occupied by him and has made his final proof, paid the amount of money required and received final certificate thereof, he has a complete equitable title to said land which he may convey. *Flanagan* v. *Forsythe*, 6 Okla. 225 (50 Pac. Rep. 152); *Laughlin* v. *Fariss*, 7 Okla. 1 (50 Pac.

Rep. 254). Construing Act Congress, March 3 1875 (18 Stat. 482); U. S. Rev. Stat., § 2288; Sand. & H. Ark. Dig., §§ 2762, 2770, 2781, it is held that a contract by a homestead claimant before he has proved up his homestead, made with a railroad company to convey to it five acres of the land to be acquired by him, for depot and other railroad purposes, when he has obtained his patent, is valid to the extent the land granted is, or would be necessary for railroad purposes. *St. Louis & S. F. Ry. Co.* v. *Tapp*, 64 Ark. 357 (42 S. W. Rep. 667). The relinquishment of a valid entry of land, under the timber culture act of Congress, constitutes a valuable consideration, and is not void against public policy. 21 U. S. Stat., 2d Ses., ch. 89, applied. *Jones* v. *Dunbar*, 52 Neb. 151 (71 N. W. Rep. 976).

Sec. 708. Mortgage of homestead lands—Liability for debts. Construing U. S. Rev. Stat., § 2296, providing that "no lands acquired under this chapter (relating to homesteads) shall in any event become liable to the satisfaction of any debt contracted prior to the issue of the patent therefor," it is held that a claim by one surety against another for contribution on account of his payment of more than his share of the debt becomes a debt only at the time of such payment, and where such excessive payment is made after the issuance of a patent to the delinquent debtor, the land is not exempt under the statute from his cosurety's claim for contribution. *Shoemake* v. *Stimson*, 16 Wash. 1 (47 Pac. Rep. 218). The statute includes a liability for a tort growing out of a breach of a contract warranting the title to personal property. *Flanagan* v. *Forsythe*, 6 Okla. 225 (50 Pac. Rep. 152). The statute does not exempt the land acquired under the homestead law from the payment of debts of a subsequent owner, although incurred prior to the date of the patent. *Duell* v. *Potter*, 51 Neb. 241 (70 N. W. Rep. 932). The exemption provided for by the statute does not apply to lands after final proof has been made and final or patent certificates issued therefor. Tarnsney, J., dissenting. *Flanagan* v. *Forsythe*, 6 Okla. 225 (50 Pac. Rep. 152). See opinion for extensive review of authorities. After the issuance of final certificate and before patent, the claimant may execute a valid mortgage upon the

land to secure a debt contracted at the time or theretofore existing. *Fariss* v. *Deming Inv. Co.*, 5 Okla. 496 (49 Pac. Rep. 926); *Howard* v. *Reckling*, 31 Or. 161 (49 Pac. Rep. 961). Citing, *Nycum* v. *McAllister*, 33 Ia. 374; *Orr* v. *Ulyatt*, 28 Nev. 134 (43 Pac. Rep. 916); *Boggan* v. *Reid*, Wash. (20 Pac. Rep. 425); *Townsend* v. *Fenton*, 30 Minn. 528 (16 N. W. Rep. 421); *Spiess* v. *Neuberg*, 71 Wis. 279 (37 N. W. Rep. 417; 5 Am. St. Rep. 211); *Kirkaldie* v. *Larrabee*, 31 Cal. 455 (89 Am. Dec. 205); *Orr* v. *Stewart*, 67 Cal. 275 (7 Pac. Rep. 698); *Lewis* v. *Wetherell*, 36 Minn. 386 (31 N. W. Rep. 856; 1 Am. St. Rep. 674); *Lang* v. *Morey*, 40 Minn. 396 (42 N. W. Rep. 88; 12 Am. St. Rep. 748); *Cheney* v. *White*, 5 Neb. 261 (25 Am. Rep. 487); *Jones* v. *Yoakam*, 5 Neb. 265.

Sec. 709. Patents — Validity—Construction—Conclusiveness. A patent for lands which have been reserved by the governmental authorities from disposal, is void. *Klauber* v. *Higgins*, 117 Cal. 451 (49 Pac. Rep. 466). U. S. Rev. Stat., § 2441, construed and applied—issue of patent upon void warrant because of duplicate having been issued. *Boyd* v. *Mammoth Spring Imp. Co.*, 137 Mo. 482 (38 S. W. Rep. 964). In determining whether or not certain lands are included within a patent which has been issued for a long time, the acts of the parties claiming thereunder in reference to the land may be considered. *Trustees of the Town of Easthampton* v. *Vail*, 151 N. Y. 468 (45 N. E. Rep. 1030). It is proper to examine the survey upon which a patent is issued to aid in supplying omissions or correcting mistakes in the patent. *Hagins* v. *Whitaker*, Ky. (42 S. W. Rep. 751); *Patrick* v. *Spradlin*, Ky. (42 S. W. Rep. 919). For construction of patent to sea, marsh or swamp lands in the state of Lousiana, see, *White* v. *Leovy*, 49 La. 1660 (22 So. Rep. 931). For construction of particular patents of land to the town of Easthampton, N. Y., see *Trustees of Town of Easthampton* v. *Vail*, 151 N. Y. 468 (45 N. E. Rep. 1030). A patent will prevail over a certificate of a homestead entry made at an earlier date. *Stringfellow* v. *Tennessee Coal, Iron & R. Co.*, 117 Ala. 250 (22 So. Rep. 997). A patent granted by virtue of a decree of

confirmation by the board of land commissioners, is conclusive against the government and all parties claiming under it by subsequent title. *Los Angeles Farming & M. Co.* v. *Thompson*, 117 Cal. 594 (49 Pac. Rep. 714). A patent issued by the land department, must be taken in an action at law as conclusive evidence of title in the patentee. *Argonaut Consol. Min. & Mill Co.* v. *Turner*, 23 Colo. 400 (48 Pac. Rep. 685; 58 Am. St. Rep. 245).

Sec. 710. Patents—Title conveyed by—Cancellation. While the naked legal title to land of the United States remains in the government until the issue of the patent therefor, the beneficial ownership or equitable title is vested in an entry man from the time he receives a certificate of purchase from the government, showing full payment therefor. A patent from the United States, issued in pursuance of, and based solely and exclusively upon, a prior entry accompanied by full payment of the purchase price, does not convey to the entry man a new and independent title disconnected with his equitable title derived from such entry and final payment, but converts the imperfect or equitable title into a perfect legal one, enabling the patentee to seek and maintain legal remedies where theretofore he was, in the absence of statute, confined to equitable ones. *Hagan* v. *Ellis*, 39 Fla. 463 (22 So. Rep. 727; 63 Am. St. Rep. 167). One in possession of land is always in a position to contest the right of another claiming under a void patent. *Klauber* v. *Higgins*, 117 Cal. 451 (49 Pac. Rep. 466). The rule is well settled that where the attempt is to annul or avoid grants, patents, or other solemn evidences of title, emanating from the government of the United States under its official seal, the great importance and necessity of the stability of titles demands that the effort to set them aside, annul or avoid them, or to correct mistakes in them, shall only be successful when the evidence is clear, strong, and satisfactory *Miller* v. *Donahue*, 96 Wis. 498 (71 N. W. Rep. 900); Citing, *Maxwell Land-Grant Case*, 121 U. S. 879–881 (7 Sup. Ct. Rep. 1015); *U. S.* v. *Des Moines Nav. & Ry. Co.*, 142 U. S. 541 (12 Sup. Ct. Rep. 308); *U. S.* v. *Budd*, 144 U. S. 161 (12 Sup. Ct. Rep. 575).

Sec. 711. Water rights on public lands. A settler in possession of public land may appropriate a water right and transfer it and his right to possession to another by oral assignment, and the latter succeeds to his rights, though the transfer is without consideration. *Wood* v. *Lowney*, 20 Mont. 278 (50 Pac. Rep. 794); *McDonald* v. *Lannen*, 19 Mont. 78 (47 Pac. Rep. 648). Where several quarter sections of land were acquired by separate patents, the fact that they are contiguous does not extend a riparian right, which is appurtenant to one quarter section, to another, though both have come into possession of the same person. *Bœhmer* v. *Big Rock Creek Irr. Dist.*, 117 Cal. 19 (48 Pac. Rep. 908). The right to appropriate water rights under U. S. Rev. Stat., § 2339, does not authorize one to interfere with the rights of a prior appropriator. *Rio Grande W. Ry. Co.* v. *Telluride Power-Trans. Co.*, 16 Utah 125 (51 Pac. Rep. 146). For further construction of this statute see *United States* v. *Rio Grande Dam & Irr. Co.*, N. M. (51 Pac. Rep. 674). A ditch constructed for mining purposes on unoccupied public lands of the United States is held by grant, and the owner of such ditch does not forfeit his right thereto merely by nonuser. Nonuser of a ditch, brought about by circumstances over which the ditch owner has no control, is not evidence of abandonment of, or intention to abandon, such ditch. *Welch* v. *Garrett*, Idaho (51 Pac. Rep. 405). This case is followed and approved on the point first stated in the case of *Ada Co. Farmers' Irr. Co.* v. *Farmers' Canal Co.*, Idaho (51 Pac. Rep. 990; 40 L. R. A. 485). Regardless of his rights as a prior appropriator, his freedom from negligence or his necessities, the operator of a placer mine has no right to deposit tailings in a running stream to the substantial injury of his neighbor's land. *Fitzpatrick* v. *Montgomery*, 20 Mont. 181 (50 Pac. Rep. 416; 68 Am. St. Rep. 622). See opinion for exhaustive discussion of this subject.

Sec. 712. Miscellaneous notes. There is an implied license to the public to go upon the unappropriated lands of the United States and pasture stock thereon and cut the native grasses therefrom for the purpose of making hay. *Mathews* v. *Great Northern Ry. Co.*, 7 N. Dak. 81 (72 N. W. Rep.

1085). Citing, *Buford* v. *Houtz*, 133 U. S. 320 (10 Sup. Ct. Rep. 305). The state may grant the exclusive use of its lands under water, but until such grant is made the right to enter and fish upon it may be exercised by all the citizens of the state. *Polhemus* v. *Bateman*, 60 N. J. L. 163 (37 Atl. Rep. 1015). A grant of lands by the public will be construed most strictly in favor of the people and against the grantee. *Trustees of Town of Easthampton* v. *Vail*, 151 N. Y. 468 (45 N. E. Rep. 1030). For construction of grants of land in the state of Illinois to the inhabitants of the parish of the Immaculate Conception of Kaskaskia, see *President of Kaskaskia* v. *McClure*, 167 Ill. 23 (47 N. E. Rep. 72). Act of Congress, Sept. 4, 1841, construed and applied—grant of "internal improvement land" to the states—title and selection. *Godwin* v. *Davis*, 74 Miss. 742 (21 So. Rep. 764). U. S. Rev. Stat., § 2477, construed and applied—grant of right of way for highways over public lands. *Walcott Tp.* v. *Skauge*, 6 N. Dak. 382 (71 N. W. Rep. 544). Particular entry of public land held insufficient. *State* v. *Calloway*, 119 N. C. 864 (26 S. E. Rep. 46). As to validity and conclusiveness of a Mexican land grant and the powers of a prefect, see *De La Guerra* v. *City of Santa Barbara*, 117 Cal. 528 (49 Pac. Rep. 733).

Sec. 713. Construction of local statutes. Cal. Stat. 1871–72, p. 622, construed and applied—defective application validated. *Klauber* v. *Higgins*, 117 Cal. 451 (49 Pac. Rep. 466). Ill. Acts Jan. 15, 1831; Feb. 4, 1851; Oct. 20, 1871, construed and applied—grant of lands to Cook county for public buildings. *Cook Co.* v. *City of Chicago*, 167 Ill. 109 (47 N. E. Rep. 210). Nev. Gen. Stat., § 1949, cl. 10; Stat. 1891, p. 148, §§ 40, 55, 59, construed and applied—sales of land acquired by county by purchase at tax sale. *Lyon Co.* v. *Ross*, Nev. (50 Pac. Rep. 1). N. J. Gen. Stat., Vol. 3, p. 2790, pl. 21, construed and applied—construction of deed by riparian commissioners. *Polhemus* v. *Bateman*, 60 N. J. L. 163 (37 Atl. Rep. 1015). Tenn. Laws 1819, ch. 54; Laws 1821, ch. 9, construed and applied—certificate of register of land officer—signing of grant by governor. *Hitchcock* v. *Southern Iron & Timber Co.*, Tenn. (38 S. W. Rep.

588). For the construction of numerous Tennessee statutes in regard to the assignment by an entryman of land platted and surveyed by him, see *King* v. *Coleman*, 98 Tenn. 561 (40 S. W. Rep. 1082). Wash. Act, March 10, 1891, construed and applied—compensation of land agent for appraising and selecting timber land. *Strobach* v. *State*, 17 Wash. 123 (49 Pac. Rep. 225).

Sec. 714. Statutes amended and new statutes. Ala. Laws 1899, p. 116, provides for the recovery of state lands not legally patented and for settling disputed titles. Cal. act Mar. 24, 1893, § 5, regulating the sale of swamp and overflowed lands is amended by Laws 1899, p. 182. Fla. Laws 1899, p. 102, confirms the title of railroad companies to lands granted to the state of Florida for railroad purposes by Act of Cong., May 17, 1856. Ida. Rev. Stat., § 2214—issuance of deeds to occupants of town sites entered under laws of United States—amended, Laws 1899, p. 141. Ida. Laws, 1899, pp. 72–79 defines the powers and duties of the state board of land commissioners and makes general provisions for the sale, rental and management of the public lands of the state. Ida. Civ. Code, §§ 3132–3134, 3140, 3141—acquiring rights of way and easements for the development of mines—amended, Laws 1899, p. 350. Ida. Laws 1899, p. 439—state board of land commissioners to accept deed from mortgagor of lands in certain cases. Ind. Laws 1899, p. 398, provides for the survey and sale of certain swamp lands by the auditor of state. Kan. Gen. Stat. 1889, par. 5769—leasing of school lands—amended, Laws 1899, p. 423. Kan. Laws 1899, p. 430, provides for the correction of defective patents for state lands. Kan. Laws 1899, p. 494, vacates certain town sites and portions of town sites. La. Laws 1899, p. 112, amends and re-enacts Laws 1890, Act No. 152, providing for the sale of school indemnity lands. Mich. Laws 1899, p. 250, sets aside certain swamp and overflowed lands bordering upon the great lakes and the bayous thereof for a public park; p. 261, provides for the sale of unpatented swamp and overflowed lands in Clay township, St. Clair county. Mont. Laws 1899, p. 87, makes provisions concerning the appraisal, sale and leasing of state

lands, and repeals numerous statutes. Neb. Laws 1899, pp. 800–815, makes general provisions concerning the registration, leasing, selling and general management of school lands and repeals Comp. Stat. 1897, ch. 80. Nev. Act Mar. 12, 1885, § 8—selection and sale of lands granted by United States to state of Nevada—amended, Laws 1899, p. 124. N. M. Laws 1899, pp. 156–166, provides for the creation of a board of public lands and prescribes their duties as to the leasing and management of public lands. Or. Laws 1899, p. 57, confirms titles of purchasers of tide lands from the state. Or. laws 1899, pp. 156–164, is a general act providing for the selection and sale of state lands and for the management and investment of the funds arising therefrom. Tex. Rev. Stat. 1895, art. 4218q—sale of school lands—amended, Laws 1899, p. 149. Tex. Rev. Stat. 1895. art. 4218y—sale of isolated and detached lands—amended, Laws 1899, p. 285. Tex. Laws 1899, p. 259—an act to validate and quiet titles to public free school, university and asylum lands sold prior to Jan. 1, 1899; to provide for patents and to prescribe limitations for bringing suits for the recovery of such lands. Tex. Laws 1899, p. 310—issuance of patents to certain land purchased under Rev. Stat. 1895, tit. 87, ch. 11. Utah Laws 1899, pp. 85–94, creates a state board of land commissioners, prescribes their duties, and makes general provisions concerning the selection, location, appraisement, protection, sale, rental and general management of the public lands of the state. Utah Laws 1899, p. 165—preference rights to settlers on school lands. Wash. Laws 1899, p. 47—trespass on public lands—penalty. Wash. Laws 1897, ch. 89, § 30—preference right to re-lease state lands—amended, Laws 1899, p. 77. Wash. Laws 1899, p. 120—appeals from board of state land commissioners. Wash. Laws 1897, ch. 89, §§ 48, 50, 51, 53—sale of tide and shore lands—amended, Laws 1899, pp. 132, 138, 225, Wash. Laws 1899, p. 155—sale of alloted lands by Indians.

QUIETING TITLE.

EPITOME OF CASES.

Sec. 715. When the action will lie and who may maintain it—Statutes construed and new statutes. A court of chancery has no jurisdiction under Ill. Rev. Stat., ch. 22, § 50, to establish an existing title without reference to any need of quieting it or removing a cloud upon it. *Harms* v. *Kransz*, 167 Ill. 421 (47 N. E. Rep. 746). An action to quiet title is not the proper remedy for an irregular levy of an execution and sale thereunder; the injured party should apply to the court wherein the judgment was rendered to have the sale set aside. *Rhode* v. *Hassler*, 113 Mich. 56 (71 N. W. Rep. 461). The action will not lie to compel a determination of the adverse claims of title of third parties. *Sulphur Mines Co.* v. *Boswell*, 94 Va. 480 (27 S. E. Rep. 24). One may maintain an action to quiet title to the stone on a certain tract of land. *Tenney* v. *Haich*, Ky. (41 S. W. Rep. 559). One claiming title by adverse possession may maintain an action to quiet his title. How. Ann. Mich. Stat., § 6626, applied. *Vier* v. *City of Detroit*, 111 Mich. 646 (70 N. W. Rep. 139). And the holder of such a title acquired by a quitclaim deed has "record title" within the meaning of Mass. Stat. 1898, ch. 340, § 1, so as to enable him to maintain proceedings to quiet title. *Ex parte Connolley*, 168 Mass. 201 (46 N. E. Rep. 618). A bill in equity is maintainable for cancellation as a cloud on title of a forged deed, which, upon the strength of a false certificate of acknowledgment made by an officer duly authorized has been put upon record. *Alexander* v. *Davis*, 42 W. Va. 465 (26 S. E. Rep. 291). A deed of trust conveying "all interest" one has in a certain lot may be cancelled as a cloud on the title of the owner thereof, although the interest of such grantor is held under a tax deed describing a portion of the lot which is so small that it is impossible to locate, possess, or use it. *Glos* v. *Furman*, 164 Ill. 585 (45 N. E. Rep. 1019).

Where one seeks to quiet his title against one holding and asserting a valid lien, he cannot do so unless he pays or tenders the payment of the lien. *Reed* v. *Kalfsbeck*, 147 Ind. 148 (45 N. E. Rep. 476). A grantee in a deed cannot maintain an action to have his title declared *bona fide* against a defendant who already has an action pending in another court against such grantee, to have the deed declared void as a fraud upon creditors. *Troy Fertilizer Co.* v. *Prestwood*, 116 Ala. 119 (22 So. Rep. 262). A plaintiff in possession may maintain an action against one out of possession claiming title but who has exerted no possessory acts upon the land which would confer upon the plaintiff the right to test his title by an action in ejectment. *Penrose* v. *Steelman*, N. J. Eq. (38 Atl. Rep. 807). Where a wife who left surviving her a husband and two children, by her will directed her executors to improve and lease her property until her younger child shall become of age, at which time the husband should take one-half of the property and each child a fourth, the rents being paid to them in the same proportion in the meantime, it is held that although the husband took a vested interest in one-half of the land, her executors could maintain an action to quiet title to determine the validity of an execution sale of his interest in the land. *Christofferson* v. *Pfennig*, 16 Wash. 491 (48 Pac. Rep. 264). Construing and applying Ind. Rev. Stat. 1894, § 251, which requires every action to be prosecuted in the name of the real party in interest, and § 1086, which authorizes any person having the right to recover possession of real property, or to quiet title thereto, in the name of another person or persons, to prosecute either action in his own name, it is held that the two sections must be construed together and a grantor in a warranty deed cannot maintain an action to quiet title in his own name against third persons claiming an interest in the land paramount and adverse to his grantee. *Chapman* v. *Jones*, 149 Ind. 484 (47 N. E. Rep. 1065). In Arkansas, "any person claiming to own land that is wild or unimproved, or land that is in the actual possession of himself, or those claiming under him, may have his title to such land confirmed and quieted by proceedings" provided for by Laws, 1899, pp. 134–136. Fla. Laws 1899, p. 127, provides that, without a previous determination of the title at law, "a bill in equity may

be brought and prosecuted to a final decree by any person or corporation whether in actual possession or not, claiming title legal or equitable to real estate against any person or corporation not in actual possession who claims an adverse estate or interest legal or equitable therein, for the purpose of determining such estate or interest and quieting, or removing clouds from, the title to such real estate." Under Or. Laws 1899, p. 227, amending Hill's Ann. Laws, § 504, "any person claiming an interest or estate in real estate not in the actual possession of another, may maintain a suit in equity against another who claims an interest or estate therein adverse to him, for the purpose of determining such conflicting or adverse claims, interests or estates."

Sec. 716. Rights of plaintiff in possession—When possession of plaintiff is necessary. Construing and applying Ala. Laws, 1892–93, p. 42, it is held that a complaint which alleges that the complainant is in the peaceable possession of the land under claim of ownership and that the defendants assert a hostile interest is not demurrable, though it shows that the tax titles under which the complaintant claims are invalid. *Adler* v. *Sullivan*, 115 Ala. 582 (22 So. Rep. 87). The court say: "This statute, * * * allows any person in peaceable possession of lands claiming to own the same, whose title thereto, or any part thereof, is denied or disputed, or when any other person claims or is claimed or is reputed to own the same, or any interest therein, or to hold any lien or incumbrance thereon, and no suit shall be pending to enforce or test the validity of such title, claim or incumbrance, to bring and maintain a suit in equity to settle the title to said lands, and clear up all doubts and disputes concerning the same." For further construction of this statute, see *Loeb* v. *Wolff*, 116 Ala. 278 (22 So. Rep. 513). The fact that a vendee held a bond for title to a lot, paid the taxes thereon, paid for the placing of a pavement in front of it and referred to it in his correspondence as "my lot" is sufficient to show that he had possession of it. *Coleman* v. *First Nat. Bank*, 115 Ala. 307 (22 So. Rep. 84). In Florida it is held that a bill to quiet title is demurrable where it does not allege that the complainant was in possession of the land at the time of filing the bill,

or that the land was wild, unimproved, and unoccupied. *Richards* v. *Morris*, 39 Fla. 205 (22 So. Rep. 650). Under the Illinois statute, an action to remove a cloud from title can only be maintained where the complainant is in possession of the premises, or where the premises are vacant and unoccupied at the time of the filing of the bill. *Glos* v. *Bouton*, 170 Ill. 249 (48 N. E. Rep. 949). While the general rule in Kansas is that in order to maintain an action to quiet title to land, the plaintiff must either be in possession, or have the legal title to the land, where it appears that the plaintiff has sold to one of the defendants, who withholds a large part of the purchase money until the title to the land is perfected, and the plaintiff is bound by contract to so perfect the title, and where it further appears that such defendant refuses to allow an action for that purpose to be brought in his name, the vendor may bring an action against the vendee and the persons claiming the adverse title or interest, for the purpose of perfecting the title in accordance with his agreement. *Sutliff* v. *Smith*, 58 Kan. 559 (50 Pac. Rep. 455). Citing, *Styer* v. *Sprague*, 63 Minn. 414 (65 N. W. Rep. 659); *Pier* v. *Fond Du Lac Co.*, 53 Wis. 421 (10 N. W. Rep. 686); *Begole* v. *Hershey*, 86 Mich. 130 (48 N. W. Rep. 790). In Kentucky it is held that a bill in equity to quiet title must aver that the plaintiff has actual possession of the land. *Cornelieson* v. *Foushee*, Ky. (40 S. W. Rep. 680); *Coppage* v. *Griffith*, Ky. (40 S. W. Rep. 908); *Smith* v. *White*, Ky. (41 S. W. Rep. 436). In Montana, in order to maintain an action to quiet title, the plaintiff must not only allege but prove possession on his part. *Sklower* v. *Abbott*, 19 Mont. 228 (47 Pac. Rep. 901). Ohio Rev. Stat. § 5779, gives a right of action to quiet title to one out of possession who claims an estate or interest in remainder or reversion in real property. It does not give such right to one out of possession who claims the entire estate. *Raymond* v. *Toledo, St. L. & K. C. R. Co.*, 57 O. St. 271 (48 N. E. Rep. 1098). In Wisconsin, one who has the legal title to land whether in possession or not, may maintain an action in equity to remove a cloud from his title, where the invalidity of the hostile claim cannot be shown by any record, but must be proved by other evidence. *Davenport* v. *Stephens*, 95 Wis. 456 (70 N. W. Rep. 661). One

having the legal title to a tract of land and who is in possession of the same, may maintain a bill in equity to remove a cloud upon his title. *Smith* v. *O'Keeffe*, 48 W. Va. 172 (27 S. E. Rep. 858).

Sec. 717. Complaint in action to quiet title. A complaint to quiet title against certificates of sale issued without authority, is insufficient where it fails to allege that a defendant holds any of the certificates or has any interest in the land. *Wilson* v. *Carter*, 117 Cal. 58 (48 Pac. Rep. 988). A bill to cancel as a cloud on title a trust deed executed by one of the defendants to his codefendant as trustee to secure the payment of a note executed by the maker to himself, is not subject to demurrer for failure to make the holder of the note a party, it not appearing that the note had been transfered. *Glos* v. *Furman*, 164 Ill. 585 (45 N. E. Rep. 1019). Ala. Laws 1892–93, p. 42, construed and applied—sufficiency of complaint. *Adler* v. *Sullivan*, 115 Ala. 582 (22 So. Rep. 87); *Loeb* v. *Wolff*, 116 Ala. 278 (22 So. Rep. 513). Particular complaint held sufficient under Minn. Gen. Stat. 1894, § 5817, to determine adverse claims to real estate. *Bovey-De Laitre Co.* v. *Dow*, 68 Minn. 278 (71 N. W. Rep. 2). For extended discussion of the sufficiency of a complaint to quiet title to a mining claim, see *McKay* v. *McDougal*, 19 Mont. 486 (48 Pac. Rep. 988).

Sec. 718. Cross complaint in action to quiet title. Where the scope of the complainant's bill is such as to call for a determination of the question of title between the parties, the defendant has a right to interpose by way of cross bill and ask relief, to which he is entitled, in case the court should find against complainant's title. *McKenzie* v. *A. P. Cooke Co.*, 113 Mich. 452 (71 N. W. Rep. 868). Citing, *Griffin* v. *Griffin*, 112 Mich. 87 (70 N.W. Rep. 428); *Shields* v. *Barrow*, 17 How. 130; *Greenwalt* v. *Duncan*, 16 Fed. Rep. 85; *Watts* v. *Sweeney*, 127 Ind. 116 (26 N. E. Rep. 681; 22 Am. St. Rep. 615); *Jones* v. *Thacker*, 61 Ga. 335; *Remer* v. *McKay*, 38 Fed. Rep. 164; *Logan* v. *McMillan*, 5 Dan. 485; *Hall* v. *Edrington*, 8 B. Mon. 47; 2 Daniell, ch. Prac. 1549. Where

one claiming real estate under a will, brings an action to quiet his title against the testator's heirs, they can assail the validity of the will by a cross complaint without filing bond required by Ind. Rev. Stat. 1894, § 2767, in proceedings to contest a will. Hackney, J., dissenting. *Putt* v. *Putt*, 149 Ind. 30 (48 N. E. Rep. 856).

Sec. 719. Practice in actions to quiet title—Miscellaneous notes—Statutes construed and amended. Where several persons claim title under the same person, some by deeds and others by contracts of purchase, requirements of which they allege have been performed, the several deeds and contracts being made at different times and embracing distinct parcels, they cannot join in a suit to remove, as a cloud upon their title, a mortgage covering all the land. *Utterback* v. *Meeker*, 16 Wash. 185 (47 Pac. Rep. 428). Where both parties claim title under a common grantor, the plaintiff is not required to trace his title back of such grantor. *Brown* v. *Taber*, 108 Ia. 1 (72 N. W. Rep. 416). In an action to quiet title by a purchaser at an execution sale as against the judgment debtor the production of the judgment, execution and sheriff's deed is *prima facie* evidence of the plaintiff's right to recover without proof that the judgment debtor had title or possession of the land at the date of the lien or of the sale. *Reilley* v. *Wright*, 117 Cal. 77 (48 Pac. Rep. 970). Where the bill alleges possession by the plaintiff and the proof shows the property to be vacant, the variance is fatal. *Glos* v. *Bouton*, 170 Ill. 249 (48 N. E. Rep. 949). As a general rule, the answer of one defendant is not admissible in evidence against his codefendant, but this rule does not prevail where the defendants are privies in estate, so that the right of one of them devolves upon the other. *Lockman* v. *Miller*, Miss. (22 So. Rep. 822). Where a complaint in an action to quiet title to a mining claim, does not call upon the defendants to set out their interest or claim of title, they may show under a general denial a valid location by them prior to the plaintiff's location. *Adams* v. *Crawford*, 116 Cal. 495 (48 Pac. Rep. 488). Where the plaintiff's title is denied and the evidence shows the land claimed to be within a grant made by the government to a railroad company, which was sub-

sequently cancelled except as to certain clauses, the plaintiff must show that he is within one of the exceptions. *Bœhmer* v. *Big Rock Creek Irr. Dist.*, 117 Cal. 19 (48 Pac. Rep. 908). Conn. Pub. Laws 1893, ch. 66, governing actions to quiet title, is not unconstitutional for the reason that it deprives litigants of the right of trial by jury, nor does it deprive the defendant in such an action of due process of law by compelling him to either say that he claims no interest in the property or to state fully what his claim is. *Miles* v. *Strong*, 68 Conn. 273 (36 Atl. Rep. 55). Ill. Rev. Stat. ch., 116, §§ 15, 20, construed and applied—proceedings to establish title under burnt records act. *French* v. *Goodman*, 167 Ill. 345 (47 N. E. Rep. 737). Particular evidence held sufficient to establish a *prima facie* case for plaintiff in an action under this statute. *Cooney* v. *A. Booth Packing Co.*, 169 Ill. 370 (48 N. E. Rep. 406). Va. Code, §§ 2861–2864, construed and applied—action to establish lost deed and removal of cloud from title—sufficiency of evidence. *Barley* v. *Byrd*, 95 Va. 316 (28 S. E. Rep. 329). Me. Rev. Stat., ch. 104, § 48—notice to defendant—decree upon default—amended, Laws 1899, ch. 99, p. 102. Mass. Laws 1897, ch. 522, § 1; Laws 1898, ch. 457, § 1—making parties defendant of persons who are non-residents, unknown, or not in being—amended, Laws 1899, p. 340. N. Dak. Rev. Codes, § 5907—parties defendant to actions to quiet title —unknown heirs— amended, Laws 1899, p. 228.

Sec. 720. Trespass to try title. A complaint in the nature of trespass to try title to a mining claim is sufficient where it avers ownership, right of possession, and the fact of possession and entry by defendant without consent of plaintiff, his mining thereon and threat to continue to mine, and damages done by reason of defendant's acts. *McKay* v. *McDougal*, 19 Mont. 488 (48 Pac. Rep. 988). A claim through a common source of title is not shown by a defendant in an action of trespass to try title claiming title under a tax deed purporting to convey to his predecessor in title the interest of the plaintiff's predecessor "and of every other claimant whomsoever in and to" the land. *Hendricks* v. *Huffmeyer*, 90 Tex. 577 (40 S. W. Rep. 1).

REAL ACTIONS.

EPITOME OF CASES.

Sec. 721. Conflict of jurisdiction between courts of concurrent jurisdiction. In cases of conflict of jurisdiction, it is well settled, as the general rule, that between two courts of concurrent jurisdiction, the court which first acquires cognizance of the controversy or obtains possession of the property in dispute is entitled to dispose of it without interference or interruption from the coordinate court. Having first acquired jurisdiction, it is entitled to retain it until the end of litigation, and should proceed to decide all questions which legitimately flow out of the subject-matter of the controversy in the case, and finally dispose of it. *Parsons* v. *Snider*, 42 W. Va. 517 (26 S. E. Rep. 285); *Craig* v. *Hoge*, 95 Va. 275 (28 S. E. Rep. 817). Citing, Wells, Jur., § 156; *Haden* v. *Garden*, 7 Leigh 157; *City of Epelika* v. *Daniel*, 59 Ala. 211; *Brooks* v. *Delaplaine*, 1 Md., Ch. 351; *Brown* v. *Wallace*, 4 Gill & J. 479; *Carson* v. *Dunham*, 149 Mass. 52 (20 N. E. Rep. 312; 14 Am. St. Rep. 397; 3 L. R. A. 203); *Gay* v. *Iron Co.*, 94 Ala. 303 (11 So. Rep. 353; 33 Am. St. Rep. 122; 16 L. R. A. 564); *Peck* v. *Jenness*, 7 How. 624; *Shelby* v. *Bacon*, 10 How. 56; *Freeman* v. *Howe*, 24 How. 450, 461; *Smith* v. *McIver*, 9 Wheat. 532; *Buck* v. *Colbath*, 3 Wall. 334; *Union Trust Co.* v. *Rockford, R. I. & St. L. R. Co.*, 6 Biss. 197 (Fed. Cas. No. 14,401); *Gaylord* v. *Railroad Co.*, 6 Biss. 286 (Fed. Cas. No. 5,284); *Sharon* v. *Terry*, 36 Fed. Rep. 337).

Sec. 722. Jurisdiction depending on title involved. A statute (Ark. Laws 1875, p. 124), providing that a court "shall have no jurisdiction of any action where the title to real estate is in controversy," does not deprive it of jurisdiction to enforce its judgment by ordering a sale of land in an action where the title to the land is in no way involved. *Waldo* v.

Thweatt, 64 Ark. 126 (40 S. W. Rep. 782). The mere assertion that title is involved will not oust a court of jurisdiction for that reason. *Barrett* v. *Cox*, 112 Mich. 220 (70 N. W. Rep. 446). Applying Kan. Laws 1895, p. 156, § 14, it is held that title to land is not involved where a defendant to an action to foreclose a mortgage pleads title to the land in himself and not in the mortgagor at the time the mortgage was exceuted. *Park* v. *Busenbark*, 59 Kan. 65 (51 Pac. Rep. 907). Where the object of an action of trespass is to determine the true boundary line between lots, title is not necessarily involved so as to oust the jurisdiction of a justice of the peace under New York Code, § 2951. *La Rue* v. *Smith*, 158 N. Y. 428 (47 N. E. Rep. 796). Construing Mo. Const. 1875, art. 6, § 12, giving exclusive appellate jurisdiction to the supreme court of that state "in cases involving title to real estate," it is held that suits for the enforcement of special tax bills, mechanics' liens, and vendors' liens, are not suits involving the title to real estate. *Barber Asphalt Paving Co.* v. *Hezel*, 138 Mo. 228 (39 S. W. Rep. 781). Nor is an action to foreclose a mortgage or trust deed. *Little* v. *Reid*, 141 Mo. 242 (42 S. W. Rep. 674). Title to real estate is not involved within the meaning of this constitutional provision, unless the result of the litigation may directly, without subsequent proceeding, affect the title to real estate, and whether it may do so is to be determined from the entire record. *May* v. *Jarvis-Conklin Mortg. Trust Co.*, 138 Mo. 447 (40 S. W. Rep. 122). An action of replevin to recover a crop does not involve title to real estate, although the title to the crop may depend on the ownership of the land. *Fischer* v. *Johnson*, 139 Mo. 433 (41 S. W. Rep. 208). An action to determine priority of rights of judgment creditors to redeem land from sale on judgment, does not relate to or involve a freehold. *Paddack* v. *Staley*, 24 Colo. 188 (49 Pac. Rep. 281). A freehold is involved in an action for the assignment of dower, *Doty* v. *Irwin*, 168 Ill. 50 (47 N. E. Rep. 768); in an action to set aside a conveyance of land on the ground of fraud, *Hand* v. *Waddell*, 167 Ill. 402 (47 N. E. Rep. 772); but a freehold is not involved in an action to determine the prority of liens on land. *Cravens* v. *Lee*, 24 Colo. 225 (49 Pac. Rep. 424). Ga. Const., art. 6, § 16, par. 6; Code, § 5172, con-

strued and applied—jurisdiction in actions "respecting titles to lands." *Saffold* v. *Scottish-Amer. Mortg. Co.*, 98 Ga. 785 (27 S. E. Rep. 208).

Sec. 723. Jurisdiction—State and federal courts. Where a state court has acquired jurisdiction in a case, entered judgment and is proceeding to its enforcement, the appointment of a receiver by the United States court for a defendant corporation, cannot divest the jurisdiction of the state court and stay the execution issued to enforce the judgment. *Lake Bristeneau Lum. Co.* v. *Mimms*, 49 La. 1288 (22 So. Rep. 730). U. S. Const., art. 1, § 8, construed and applied—jurisdiction of federal courts over land ceded by the state to the United States for federal buildings. *State* v. *Mack*, 23 Nev. 359 (47 Pac. Rep. 768; 62 Am. St. Rep. 811).

Sec. 724. Jurisdiction—Legal and equitable. The existence of a remedy at law cannot deprive courts of equity of jurisdiction in a matter that comes within the scope of their elementary jurisdiction. *Hull* v. *Watts*, 95 Va. 10 (27 S. E. Rep. 829). Courts of equity will not interpose to ascertain boundaries unless in addition to the naked confusion of the controverted boundaries there is suggested some peculiar equity which has arisen from the conduct, situation, or relation of the parties. *Collins* v. *Sutton*, 94 Va. 127 (26 S. E. Rep. 415). Although a court of equity has not jurisdiction of an action to settle a boundary, its jurisdiction of an action to quiet title to, and enjoin interference with, land, is not ousted because the question of determining a boundary is also in issue. *Campbell* v. *Adsit*, 111 Mich. 575 (70 N. W. Rep. 141). Equity will not entertain jurisdiction to settle an account as to rents between tenants in common and force the collection of the same, where the amount of rents received is certain and there is no complication of accounts. *McCaw* v. *Barker*, 115 Ala. 543 (22 So. Rep. 131). A court of equity will not assume jurisdiction of the administration of estates except in extraordinary cases. *Goodman* v. *Kopperl*, 169 Ill. 186 (48 N. E. Rep. 172). Equity will construe a devise when such construction is incidental to its general jurisdiction over trusts. A court of equity will not assume jurisdiction to construe a

will alleged to pass real estate, at the instance of an executor, who is not, by the terms of the will, given an estate in the property disposed of, nor charged with the performance of any trust or other duty in relation thereto. *Torrey* v. *Torrey*, 55 N. J. Eq. 410 (36 Atl. Rep. 1084). A court of equity having acquired jurisdiction to enjoin an irreparable injury to land will go on to do complete justice, though in doing so it has to try title and administer remedies which properly pertain to courts of law. *Bettman* v. *Harness*, 42 W. Va. 433 (26 S. E. Rep. 271; 36 L. R. A. 566); *Miller* v. *Wills*, 95 Va. 337 (28 S. E. Rep. 337). Equity may retain jurisdiction over an action in ejectment where the complaint also seeks cancellation of a bond for title on account of fraud. *Turner* v. *Newman*, Ky. (39 S. W. Rep. 504). A suit in equity to annul a forged deed of land, and have it canceled, and the record of it declared void, brought by the legal owner of the land, who is the grantor named in the forged deed, or the party holding title from such grantor, who institutes suit to annul such forged deed while he is out of possession, is not taken out of equitable jurisdiction by the fact that the deed is void. It is not necessary, before bringing such suit, that the legal owner should establish his title and obtain possession of the land by ejectment at law. *Hoopes* v. *Devaughn*, 43 W. Va. 447 (27 S. E. Rep. 251). Equity enforces contracts and covenants in regard to the use of property entered into between prior grantors and grantees, especially if common property, or property descending from common sources, against subsequent owners affected with actual or constructive notice of such contracts and covenants. *Trudeau* v. *Field*, 69 Vt. 446 (38 Atl. Rep. 162).

Sec. 725. Jurisdiction over lands in another county or state—Enjoining acts of non-residents. Where the court has jurisdiction of the parties, it may enjoin a threatened trespass upon lands lying in another county. *Clad* v. *Paist*, 181 Pa. St. 148 (37 Atl. Rep. 194). Where the same debt is secured by several mortgages upon lands in different counties, executed at different times, they may be regarded as one instrument for the purpose of giving jurisdiction to a court in either county to foreclose them. *Commercial Nat.*

Bank v. *Johnson*, 16 Wash. 536 (48 Pac. Rep. 267). A court of general equity jurisdiction, having the necessary parties before it, has jurisdiction to foreclose a trust mortgage on a railroad and its franchises, though part of the line is outside the state, or to direct the trustees to make the sale under the power in the mortgage. *Craft* v. *Indianapolis, D. & W. Ry. Co.*, 166 Ill. 580 (46 N. E. Rep. 1132). A court of equity has jurisdiction to grant relief against the obstruction of a water course by a dam built by a non-resident so as to work an injury to a resident owner of adjoining land. *Gordon* v. *Warfield*, 74 Miss. 553 (21 So. Rep. 151).

Sec. 726. Jurisdiction—Particular courts—Miscellaneous cases. Under Tex. Rev. Stat. 1895, art. 996, the supreme court has no jurisdiction of an action to determine boundaries. *New York & T. Land Co.* v. *Votaw*, 91 Tex. 282 (42 S. W. Rep. 969). Miss. Const., § 156, giving the circuit court original jurisdiction of "all matters civil," is held to give it jurisdiction of actions of ejectment. *Illinois Cent. R. Co.* v. *Le Blanc*, 74 Miss. 650 (21 So. Rep. 760). Where the jurisdiction of a court and the right of the plaintiff to prosecute in it has once attached, that right cannot be arrested or taken away by proceedings by the defendant in any other court. *Troy Fertilizer Co.* v. *Prestwood*, 116 Ala. 119 (22 So. Rep. 262). In Virginia it is held that the holder of a mortgage debt, who has a right to maintain an action on a covenant of assumption made by a purchaser of the mortgaged premises, may maintain an action for personal judgment against such vendee in a jurisdiction where the parties may be found, although it be different from that in which the mortgaged land is located. *Tatum* v. *Ballard*, 94 Va. 370 (26 S. E. Rep. 871). Mo. Rev. Stat. 1889, § 2011, applied—bringing suit in county where land lies—change in boundary by change in the course of a river. *Vogelsmeier* v. *Prendergast*, 137 Mo. 271 (39 S. W. Rep. 88). W. Va. Code 1891, ch. 132, § 1—jurisdiction of court to decree sale of property—amended, Laws 1899, p. 166.

Sec. 727. Former adjudication—General principles. A party claiming title adverse to former adjudication by which

he is not bound, cannot rely on such adjudication as an estoppel against parties to it. Estoppels must be mutual. *Buford* v. *Adair*, 43 W. Va. 211 (27 S. E. Rep. 260; 64 Am. St. Rep. 854). Bringing an action in ejectment does not estop the plaintiff from maintaining another action against the defendant in which he must allege that the defendant is not in possession of the land. *Glos* v. *Bouton*, 170 Ill. 249 (48 N. E. Rep. 949). Between the parties to it, a judgment is conclusive upon all questions involved within the issues whether specifically adjudged or not. *Union Pac. Ry. Co.* v. *Chicago, R. I. & P. Ry. Co.*, 164 Ill. 88 (45 N. E. Rep. 488). In South Carolina it is held that "a judgment is not conclusive of every question which might have been made in the case as is sometimes erroneously said, but only of matters that had of necessity to be determined before the judgment could have been given." *Anderson* v. *Cave*, 49 S. C. 505 (27 S. E. Rep. 478). In order for a judgment to be *res adjudicata*, the parties or their privies and the subject matter must be the same and the precise point must have been ruled on. *Newell* v. *Neal*, 50 S. C. 68 (27 S. E. Rep. 560). A decree enjoining a person from reasserting title to the property involved, is in reality one decreeing the plaintiff to be the owner of the same though it may not so declare in express terms. *Chadwick* v. *Gulf States Land & Imp. Co.*, 49 La. 757 (22 So. Rep. 287). A decree of foreclosure rendered by consent of the parties to it, in the absence of fraud in its procurement, is conclusive upon them. *Adler* v. *Vankirk Land & Construction Co.*, 114 Ala. 551 (21 So. Rep. 490; 62 Am. St. Rep. 133). Where, in an action to quiet title one is made a party to a cross bill filed by a defendant, and the decree specifically determined the right of such party to redeem, the judgment will conclude him as to all other matters which might have been raised and determined. *Roby* v. *Calumet & C. Canal & Dock Co.*, 165 Ill. 277 (46 N. E. Rep. 214). A judgment for plaintiff in ejectment recovered on his legal title, will bar an equitable action by the defendant to recover for improvements when he could have litigated his claim in the former action. *Frick* v. *Safe Deposit & T. Co.*, 183 Pa. St. 271 (38 Atl. Rep. 601). An adjudication that a court of equity has no jurisdiction to determine one's title to real estate, does not bar a subsequent

action brought under a statute subsequently enacted which confers such jurisdiction. *Miles* v. *Strong*, 68 Conn. 273 (36 Atl. Rep. 55).

Sec. 728. Former adjudication — Who bound by. Only parties and their privies are bound by a judgment. *Malona* v. *Schwing*, Ky. (39 S. W. Rep. 523). A decree in equity affecting the trust estate rendered against the trustee in the absence of the *cestui que trust*, is not binding upon the latter unless the trustee was authorized to represent the *cestui que trust*. *Lebeck* v. *Ft. Payne Bank*, 115 Ala. 447 (22 So. Rep. 75). A judgment in ejectment against a tenant by the curtesy is not conclusive as against the remaindermen. *Lineberger* v. *Newkirk*, 179 Pa. St. 117 (36 Atl. Rep. 193). A judgment in ejectment in favor of a third person against a tenant, does not bind the landlord unless he is admitted to defend or joined with the tenant in making defense, notwithstanding he may be dispossessed by the writ of possession against the tenant if he receives possession from the tenant *pendente lite*. *Wilson* v. *State*, 115 Ala. 129 (22 So. Rep. 567). A judgment in ejectment recovered by one tenant in common against his cotenant, is conclusive on them and their privies. *Estes* v. *Nell*, 140 Mo. 639 (41 S. W. Rep. 940). Where plaintiff, in an action of ejectment, is given an opportunity to litigate a defendant's claim of homestead and fails to do so, a decree adjudging the homestead in the defendant is conclusive upon him. *C. Aultman & Co.* v. *Utsey*, 49 S. C. 399 (27 S. E. Rep. 405). Decrees of a probate court, made in matters and against parties within the sphere of its jurisdiction, not appealed from, are conclusive upon those to whom the right of appeal is given and cannot be collaterally attacked. *In re Well's Estate*, 69 Vt. 388 (38 Atl. Rep. 83). A decree of injunction obtained by a landowner against a contractor performing work on his land, which a third person has employed him to do is not conclusive upon such employer, where he was not made a party to the decree. *McCallister* v. *Bridges*, Ky. (40 S. W. Rep. 70). One not a party to a mortgage, who, on his own motion, becomes a party to an action brought to foreclose it and files an answer setting up his title, is bound by the judgment rendered in the action.

Piedmont Wagon Co. v. *Byrd*, 119 N. C. 460 (26 S. E. Rep. 144). Creditors for whose benefit an administrator brings an action to set aside a fraudulent conveyance of his decedent, are bound by the judgment rendered in the action. *Hansen's Empire Fur Factory* v. *Teabout*, 104 Ia. 360 (73 N. W. Rep. 875). A vendee in possession of land under a contract of purchase, is not bound by a judgment rendered in an action to quiet title against his vendor to which he was not a party. *Steel* v. *Long*, 104 Ia. 89 (73 N. W. Rep. 470). Where, pending proceedings to enforce a mechanic's lien against the leasehold estate, the lessor acquires possession by action in accordance with the terms of the lease, one who purchases at a sale made in pursuance of a subsequent judgment in the mechanic's lien proceedings, is bound by the decree under which the lessor claims possession. *Seltzer* v. *Robbins*, 181 Pa. St. 451 (37 Atl. Rep. 567). When a landowner is notified by a city to appear and defend against an action brought against it for injuries resulting from an opening in a sidewalk made by him, he is bound by the judgment rendered against the city, and in a subsequent action over against him by the city, it is not required to show that he was negligent in the use of the opening. *City of Pawtucket* v. *Bray*, 20 R. I. 17 (37 Atl. Rep. 1). Infant heirs made parties and represented by a guardian in a proceeding to sell their decedent's real estate to pay debts, who admit the allegations of the complaint and permit the sale to be made, are estopped to subsequently assert a claim of homestead in the premises. *Morrisett* v. *Ferebee*, 120 N. C. 6 (26 S. E. Rep. 628). Parties to equitable proceedings which result in a sale of land under order of the court, who accept their allotted portions of the proceeds and acquiesce in the judgment and sale for a period of years, are estopped to question the sale on account of matters which they could have litigated in the proceedings. *Schartzer* v. *Mountain Lake Park Ass'n*, 86 Md. 335 (37 Atl. Rep. 786). Interveners in an action of slander of title, having joined the plaintiff for the purpose of making common cause in resisting the claims of the defendant, and its attempt to sell the property in controversy *pendente lite*, but at the same time setting up title in themselves adverse to that of the plaintiff, cannot be said to have adopted the allegations of the

plaintiff's petition, and bound themselves by a judicial estoppel precluding them from bringing a new suit adversely thereto. *Besson* v. *City of Donaldsville*, 49 La. 278 (21 So. Rep. 262). Where a person in possession of property under a title by purchase is made defendant in a petitory action, and judgment is rendered in favor of plaintiff, decreeing him the ownership of the same, the fact that defendant's vendor was not made by him a party to the suit may leave the question of title open incidentally to inquiry in determining the personal responsibility of the latter in warranty (La. Rev. Civ. Code, arts. 2517, 2518); but it is closed by the judgment as between the vendors and the plaintiff in the petitory action. It cannot be reopened by the bringing of the latter into the suit between the vendee and his vendor touching the responsibility of the latter on his warranty, *Gathe* v. *Broussard*, 49 La. 312 (21 So. Rep. 889).

Sec. 729. Former adjudication—Particular cases. An adjudication of the validity of a lease in an action for rent due under it, is conclusive in another action thereon for a subsequent installment of rent. *Louisville, N. A. & C. Ry. Co.*, v. *Carson*, 169 Ill. 247 (48 N. E. Rep. 402). A valid judgment, awarding a certain sum to a cotenant in his action against his cotenant for an accounting is conclusive against a subsequent claim by the defendant for improvements. *Angelo* v. *Aldridge*, 164 Ill. 388 (45 N. E. Rep. 722). A judgment between the parties to a contract reforming and decreeing a specific performance of it, is conclusive upon them as to the validity of the contract. *Union Pac. Ry. Co.* v. *Chicago R. I. & P. Ry. Co.*, 164 Ill. 88 (45 N. E. Rep. 488). A decree establishing the validity of a deed in an action brought to avoid it for fraud, concludes the parties thereto from assailing the deed as a forgery, unless the party seeking to set up the forgery shows that he was prevented from doing so in the former action. *Hamilton* v. *McLean*, 139 Mo. 678 (41 S.W. Rep. 224). A judgment denying the right of a city to condemn property for the widening of a street because the proceeding had for its object the illegal surrender of the street to a railroad company, does not bar a subsequent proceeding by the railroad company to condemn a part of the same land

for its use, nor a subsequent proceeding by the city to condemn the remainder for street purposes. *Ligare* v. *Chicago, M. & N. R. Co.*, 166 Ill. 249 (46 N. E. Rep. 803). The recovery of damages by a land owner from a railroad company for its causing the overflow of a portion of his land by the negligent construction of its road bed, is not a bar to a subsequent action for damages to another portion of his land resulting from the same cause which had suffered no injury at the time of the former action. *Illinois Cent. R. Co.* v. *Wilbourn*, 74 Miss. 284 (21 So. Rep. 1). Where suit is brought to foreclose as a mortgage an executory contract for the sale of real estate, decree rendered, real estate sold and the proceeds applied on the amount found due, then on the hearing of an application for personal judgment for deficiency against the vendee, neither party can litigate any material issue determined by such decree. *Kloke* v. *Gardels*, 52 Neb. 117 (71 N. W. Rep. 955). Where, in an action to set aside deeds for fraud, a consent decree dismissing a previous action by the complainant for the same purpose is set up as a defense, and he has an opportunity to assail its validity on account of fraud, which he fails to do, and judgment is rendered against him in the second suit, he cannot afterwards maintain a suit to set aside the consent decree for fraud. *Royster* v. *Horner*, 86 Md. 249 (37 Atl. Rep. 718; 63 Am. St. Rep. 510). Where the court rendering it had jurisdiction of the parties and the subject matter, a judgment for the plaintiff in ejectment rendered by default, is conclusive against the defendant as to the plaintiff's title, although it was not sufficiently set forth in plaintiff's declaration. *Bradford* v. *Burgess*, 20 R. I. 290 (38 Atl. Rep. 975). A former adjudication, in a suit brought for that purpose alone, determining that the language, in a conveyance of real estate, " The said grantors to have their life maintenance out of the following described land or its proceeds," does not create a specific lien or charge on the land, will not estop the grantors in such conveyance from setting up a personal claim for such maintenance against the grantees or their estates when such question was in no wise involved in or adjudicated in such former suit. *Brown* v. *Squires' Adm'r*, 42 W. Va. 867 (26 S. E. Rep. 177).

Sec. 730. Former adjudication—Stare decisis—Overruling decisions. The rule of *stare decisis* will not be invoked on the ground of sustaining a rule of property to prevent a court from overruling its decision on a former appeal in a case involving vast property rights, where it is improbable that many titles were acquired on the strength of the former opinion. *Wilson* v. *Beckwith*, 140 Mo. 359 (41 S. W. Rep. 985). A decision of a court, although construing a statute, is not a law, but merely evidence of what the law is, and the overruling of a decision by the same court is not a change of the law within the meaning of the constitutional provision prohibiting a state from passing a law impairing the obligation of contracts. *Storrie* v. *Cortes*, 90 Tex. 283 (38 S. W. Rep. 154; 35 L. R. A. 666). Citing, *Land Co.* v. *Laidley*, 159 U. S. 109 (16 Sup. Ct. Rep. 80); *Knox* v. *Bank*, 12 Wall, 379; *Water Co.* v. *Easton*, 121 U. S. 388; (7 Sup. Ct. Rep. 916); *Railroad Co.* v. *McClure*, 10 Wall, 511; *Bradshaw* v. *Mill Co.*, 52 Minn. 59 (53 N. W. Rep. 1066); *Allen* v. *Allen*, 95 Cal. 184 (30 Pac. Rep. 218; 16 L. R. A. 646); *Stockton* v. *Manufacturing Co.*, 22 N. J. Eq. 56.

Sec. 731. What is a sufficient tender. A vendee whose tender is insufficient in amount, is not entitled to demand a deed, though no objection is made to it by his vendor, under Ia. Code 1873, § 2107, providing that a person to whom a tender is made, must at the time make any objections which he may have to the money, instrument, or property tendered, or he will be deemed to have waived them, as the clause, "objection to the money," refers to the character or kind of money used and not to the amount. *McWhirter* v. *Crawford*, 104 Ia. 550 (72 N. W. Rep. 505). Where in an action to quiet title, a defendant seeks to cancel the tax title under which the plaintiff claims and the privilege of redeeming therefrom, his right to redeem will not be denied because he fails to actually tender the amount found due, where, in his answer he offers to pay the amount which may be found due. *Crawford* v. *Liddle*, 101 Ia. 148 (70 N. W. Rep. 97). As to what is a sufficient allegation of tender, see *Neldon* v. *Roof*, 55 N. J. Eq. 608 (38 Atl. Rep. 429).

Sec. 732. Injunctions—General principles—Practice. In order for the existence of a remedy at law to bar the right to an injunction, the legal remedy must be plain, adequate, complete, and as sufficient to the ends of justice as the remedy in equity. *Barbee* v. *Shannon*, Ind. Ter. (40 S. W. Rep. 584). An abutting owner cannot enjoin the illegal construction of a railroad in a street for the reason that the proper municipal consent has not been obtained where he has a complete and adequate remedy at law for all damages he may suffer. *Doane* v. *Lake St. El. R. Co.*, 165 Ill. 510 (46 N. E. Rep. 520; 56 Am. St. Rep. 265; 36 L. R. A. 97). Where a court of equity takes jurisdiction of a bill for injunction by reason of an allegation of the insolvency of the defendant, its jurisdiction cannot be ousted by a general denial of this fact, but only upon an affirmative plea showing that an adequate remedy exists at law. *Kaufman* v. *Weiner*, 169 Ill. 596 (48 N. E. Rep. 479). A preliminary injunction must not do what can only be done after full hearing by final decree, as by changing the possession of realty, or by depriving one in possession of its benefits, in any other respect than as to the wrongful act proper to be enjoined; the proper purpose of such injunction being to preserve the present status until a full hearing on the merits shall be had. An injunction as to so much of it as is excessive is void, and ought to be modified on motion. *Bettman* v. *Harness*, 42 W. Va. 433 (26 S. E. Rep. 271; 36 L. R. A. 566). A complaint for injunction by several lot owners, against the maintenance of separate injunction suits against them by one claiming a dower interest in the lots, is multifarious. *Douglass* v. *Boardman*, 118 Mich. 618 (71 N. W. Rep. 1100). Under Ia. Code 1878, § 3389, an injunction in an action after appeal must be issued by the appellate court. *Hyatt* v. *Clever*, 104 Ia. 338 (73 N. W. Rep. 881). Ind. Rev. Stat. 1894, §§ 3636, 3644, construed and applied—injunction against appropriation of land by a city for public improvements. *City of Ft. Wayne* v. *Ft. Wayne & Y. R. Co.*, 149 Ind. 25 (48 N. E. Rep. 842).

Sec. 733. Injunction to prevent irreparable injury—Irreparable injury defined. Where there is irreparable injury, injunction lies though there be conflicting title. *Bett-*

man v. *Harness*, 42 W. Va. 433 (26 S. E. Rep. 271; 36 L. R. A. 566). Citing, *Erhardt* v. *Boaro*, 113 U. S. 537 (5 Sup. Ct. Rep. 565); *Iron Co.* v. *Reymert*, 45 N. Y. 703; note to *Jerome* v. *Ross*, 7 Johns. Ch. 315 (11 Am. Dec. 506); 1 High, Inj., § 69; 2 Beach, Inj., § 1140. By the term "irreparable injury," it is not meant that there must be no physical possibility of repairing the injury. All that is meant is that the injury would be a grievous one, or at least a material one, and not adequately reparable in damages. *Woods* v. *Early*, 95 Va. 307 (28 S. E. Rep. 374); *Masonic Temple Ass'n* v. *Banks*, 94 Va. 695 (27 S. E. Rep. 490). Citing, *Sanderlin* v. *Baxter*, 76 Va. 299, 306 (44 Am. Rep. 165). Unlawful extraction of oil or gas from lands constitutes an irreparable injury which may be enjoined. *Williamson* v. *Jones*, 43 W. Va. 562 (27 S. E. Rep. 411; 38 L. R. A. 694; 64 Am. St. Rep. 891); *Bettman* v. *Harness*, 42 W. Va. 433 (26 S. E. Rep. 271; 36 L. R. A. 566). In the last case the court say: "What is irreparable injury? It is impossible to define it inflexibly. Rights of property and its uses change so; so many new rights of property with new uses arise as time goes on. Here is the right to oil and gas a few years ago unknown; the right sometimes in the owner of the soil, sometimes in separate ownership. The word 'irreparable' means that which cannot be repaired, restored, or adequately compensated for in money, or where the compensation cannot be safely measured. The courts have generally regarded as irreparable injuries the digging into mines of coal, iron, lead, and precious metals, and as such injuries subtract from the very substance of the estate, and tend to its ultimate destruction, equity is said to be prompt to restrain them. Rock, if of special value, comes under this rule. See *U. S.* v. *Gear*, 3 How. 120, and other cases cited in note to *Jerome* v. *Ross*, 7 Johns. Ch. 315 (11 Am. Dec. 501); note to *Smith* v. *Gardner*, 21 Or. 221 (6 Pac. Rep. 771; 53 Am. Rep. 347); 1 Beach, Inj., § 35; 1 High, Inj., § 730. We know but little of petroleum oil and gas hidden far in the bowels of the earth, but from that little we can say they are of great value, and are exhaustible, and, when exhausted in a locality, cannot be restored by the art of man, and perhaps never even by the mysterious alchemy of nature. Surely, they fall under the rule which considers the subtraction

of precious things from under the soil as working irreparable injury, as much as iron ore in *Anderson* v. *Harvey's Heirs*, 10 Grat. 386, to which I refer as decisive and binding under this branch of this case."

Sec. 734. Causes sufficient for granting injunctions. Equity will, by injunction, restrain the infraction of an agreement contained in a lease, in regard to the use of the premises, although such lease may not contain an express or formal covenant or a forfeiture clause with the right of reentry. *Spalding Hotel Co.* v. *Emerson*, 69 Minn. 292 (72 N. W. Rep. 119). Citing, *De Forest* v. *Byrne*, 1 Hilt. 43; *Dodge* v. *Lambert*, 2 Bosw. 570, and citations; *Maddox* v. *White*, 4 Md. 72 (59 Am. Dec. 67); *Frank* v. *Bunnemann*, 8 W. Va. 462; *Kirkpatrick* v. *Peshine*, 24 N. J. Eq. 206; *Ganett* v. *Albree*, 108 Mass. 378. One obtaining a lease by fraud, who has been notified by his lessor that the lease was terminated on account thereof, may be enjoined from taking possession. *Newcome* v. *Ewing*, Ky. (42 S.W. Rep.105. The attempted foreclosure of a mortgage by advertisement and sale for more than double the sum due the mortgagee, may be enjoined. *Carey* v. *Fulmer*, 74 Miss. 729 (21 So. Rep. 752). An injunction will lie to prevent the overflowing of land by a water-power company where it fails to pay the damages duly assessed against it by a proceedings duly authorized by its charter. *Wilmington Water-Power Co.* v. *Evans*, 166 Ill. 548 (46 N. E. Rep. 1083). A tenant in common lawfully occupying a portion of the building on the common estate may enjoin his cotenant from making changes in the interior of such building which will result in a material and continuing injury to his occupancy. *Woods* v. *Early*, 95 Va. 307 (28 S. E. Rep. 874). Particular evidence held insufficient to authorize the dissolution of a temporary injunction. *Bullard* v. *Kempff*, 119 Cal. 9 (50 Pac. Rep. 780). Mo. Rev. Stat. 1889, § 5510—when remedy by injunction exists—amended, Laws 1899, p. 226.

Sec. 735. Causes insufficient for granting injunctions. A court of equity will not enjoin the issuance of a tax deed void on its face. *Z. Russ & Sons Co.* v. *Crich-*

ton, 117 Cal 695 (49 Pac. Rep. 1043). A complaint alleging possession and ownership under a title superior to a judgment under which an execution sale of the property is threatened, does not show a cause for enjoining such sale by simply alleging that on account of it insurance companies have cancelled their insurance. *Pelican River Milling Co.* v. *Maurin*, 67 Minn. 418 (69 N. W. Rep. 1149). A tenant who has agreed with his landlord desiring to rebuild the premises, that he will terminate his lease, the expense of his removal being equitably adjusted, cannot enjoin the landlord from taking possession and prosecuting the construction of his building, where his rights under the contract can be made secure by bond. *Pike* v. *New Hampshire Trust Co.*, 67 N. H. 227 (38 Atl. Rep. 721). A plaintiff is not entitled to an injunction to prevent a defendant from transferring property, where he is protected in this particular by a *lis pendens*, and where his *lis pendens* is not sufficient protection in in such a case he is not entitled to such an injunction where he does not allege or prove that the defendant is threatening to transfer and convey the title to the property in controversy. *City of Spokane* v. *Amsterdamsch Trustees Kantoor*, 18 Wash. 81 (50 Pac. Rep. 1088).

Sec. 736. Injunction against trespass. A plaintiff who has an adequate remedy at law, is not entitled to a mandatory injunction to remove from his real estate one who, without color of title, unlawfully and forcibly entered and wrongfully remains thereon, though such trespasser be insolvent. *Warlier* v. *Williams*, 53 Neb. 143 (73 N. W. Rep. 539). Under S. C. Laws 1885, ch. 401, "in an application for an injunction to enjoin a trespass on land, it shall not be necessary to allege the insolvency of the defendant when the trespass complained of is continuous in its nature or is the cutting or destroying of timber trees." *McKay* v. *Chapin*, 120 N. C. 159 (26 S. E. Rep. 701). As a general rule equity will not interpose in case of a mere naked trespass, but where the act done or threatened to be done would be destructive of the substance of the estate, or if repeated acts or wrongs are done or threatened to be done, or the injury is or would be irreparable, the trespass may be enjoined. *Miller* v. *Wills*, 95 Va. 337

(28 S. E. Rep. 337). To authorize an injunction to restrain a trespass the bill must charge that irreparable damage will result if the injunction is denied, setting forth facts constituting such injury or that defendant is insolvent. *Collins* v. *Sutton*, 94 Va. 127 (26 S. E. Rep. 415). A landlord may have an injunction against a trespasser interfering with the possession of his tenants, although he has no right to possession. Where an act of trespass may be indefinitely repeated, injunction is the proper remedy. *Barbee* v. *Shannon*, Ind. Ter. (40 S. W. Rep. 584). In support of the last proposition the court cite: *Galway* v. *Railway Co.*, 128 N. Y. 132 (28 N. E. Rep. 479; 13 L. R. A. 788); *Tantlinger* v. *Sullivan*, 80 Ia. 218 (45 N. W. Rep. 765); *Ladd* v. *Osborne*, 79 Ia. 93 (44 N. W. Rep. 235); *Shaffer* v. *Stull*, 32 Neb. 94 (48 N. W. Rep. 882); *Smithers* v. *Fitch*, 82 Cal. 153 (22 Pac. Rep. 935); *Wheelock* v. *Noonan*, 108 N. Y. 179 (15 N. E. Rep. 67; 2 Am. St. Rep. 405). It is held proper to refuse a temporary injunction against alleged threatened acts of trespass, when the defendant both by answer and affidavit disclaims any right to commit the acts and positively denies that he ever intended to commit them. *Hagemeyer* v. *Village of St. Michael*, 70 Minn. 482 (73 N. W. Rep. 412). A landowner cannot enjoin the construction of a railroad across his land before condemnation proceedings, where it appears that his damages are only nominal, that the railroad company has made every reasonable effort to secure a right of way by agreement, and that the landowner purchased the land for the purpose of obstructing the construction of the railroad. *Bray* v. *Ocean City R. Co.*, N. J. Eq. (37 Atl. Rep. 604). Where, in an action to enjoin a trespass, the main question is the location of a boundary line between two states upon which there is conflicting evidence, the court should abide by the facts as found by the jury. *Miller* v. *Wills*, 95 Va. 337 (28 S. E. Rep. 337). Particular case in which injunction is held to be the proper remedy to prevent a trespass. *Kern* v. *Field*, 68 Minn. 317 (71 N. W. Rep. 393; 64 Am. St. Rep. 479).

Sec. 737. Injunction against trespass—Insolvency or nonresidence of defendant as a ground for. Injunction is the proper remedy to prevent a threatened repetition of a

trespass where the defendant is insolvent. *Kaufman* v. *Wiener*, 169 Ill. 596 (48 N. E. Rep. 479). In the case of *Miller* v. *Wills*, 95 Va. 337 (28 S. E. Rep. 337), the supreme court of appeals of Virginia say: "It has accordingly been held, upon the ground of the inadequacy of the remedy at law, that an injunction will lie in the case of a trespass, where the trespasser is pecuniarily irresponsible. 1 High, Inj., § 356; *Musselman* v. *Marquis*, 1 Bush. 463 (89 Am. Dec. 637); *Spear* v. *Cutter*, 5 Barb. 486; *Mulry* v. *Norton*, 100 N. Y. 424 (3 N. E. Rep. 581; 53 Am. Rep. 206); *Webb* v. *Harp*, 38 Ga. 641; *Hicks* v. *Compton*, 18 Cal. 206; and *Morgan* v. *Palmer*, 48 N. H. 338. While mere insolvency would not generally be decisive of the right to grant an injunction, it constitutes in particular cases an important element in determining whether the court, in the exercise of a sound discretion, should award it; for, the trespasser being insolvent, the legal remedy, though theoretically perfect, would be practically fruitless. And for a similar reason the nonresidence of the trespasser, which is the case with the appellees here, is justly entitled to much weight in determining the propriety of awarding the injunction; for it would be unjust that a court of equity should turn from its doors a citizen of the state, who has been subjected to aggravated and repeated trespasses, and leave him to seek redress through the precarious remedy of a suit at law in a foreign jurisdiction."

Sec. 738. Mandatory injunctions to recover possession or remove structures. A party is not entitled to a mandatory injunction to aid in the recovery of the possession of real property, where his petition shows that he has a plain and adequate remedy at law. *Laughlin* v. *Fariss*, 7 Okla. 1 (50 Pac. Rep. 254). Citing, *Lacassagne* v. *Chapuis*, 144 U. S. 119 (12 Sup. Ct. Rep. 659); *Bodwell* v. *Crawford*, 26 Kan. 292 (40 Am. Rep. 306); *Weeks* v. *White*, 41 Kan. 569 (21 Pac. Rep. 600). Where a small and insignificant portion of one's land which was uninclosed and unproductive had been encroached upon with a building erected by an adjoining owner, which was erected in good faith and did not interfere with the use of the remainder of the land, equity will not compel a removal of the building where the cost of such

removal would largely exceed the value of the land occupied by it and it appears that the injured party has been awarded adequate damages. *Methodist Episcopal Soc.* v. *Akers*, 167 Mass. 560 (46 N. E. Rep. 881). Where one, ignorant of his boundary line, projects the cornice and window sill of his building over the land of an adjoining owner, who warns him of the encroachment during the erection of the building, the latter is entitled to a mandatory injunction against the maintenance of the building over and upon the land; but such injunction will not be extended to slight unintentional and harmless encroachments of a wall underneath the surface of the earth. *Harrington* v. *McCarthy*, 169 Mass. 492 (48 N. E. Rep. 278; 61 Am. St. Rep. 298).

Sec. 739. Appointment of receivers—Practice. Where the only issue in an action of ejectment is the plaintiff's title and right to possession, a receiver will not be appointed. *Sengfelder* v. *Hill*, 16 Wash. 355 (47 Pac. Rep. 757; 58 Am. St. Rep. 36). Where there can be an immediate advertisement and sale of a manufacturing plant under a mortgage, a receiver should not be appointed to sell it and pay the mortgage debt, *Beardslee* v. *Citizens' Com. & Sav. Bank*, 112 Mich. 377 (70 N. W. Rep. 1027). A receiver may he appointed in an action brought by a deserted wife for maintenance and to set aside conveyances made by her husband for the purpose of defeating her right to maintenance. *Murray* v. *Murray*, 115 Cal. 266 (47 Pac. Rep. 87; 56 Am. St. Rep. 97; 37 L. R. A. 626). Against a defendant in possession under claim of title, equity will not interfere by appointing a receiver in favor of a plaintiff setting up a mere legal title. There must be some special circumstances of imminent danger or of loss or of irreparable injury or fraud, to warrant the court in interfering before the plaintiff's title has been established at law. If it appears that the plaintiff is protected by a *lis pendens* or that the person in possession is solvent, or offers to secure the plaintiff by bond, a receiver should not be appointed. *City of Spokane* v. *Amsterdamsch Trustees Kantoor*, 18 Wash. 81 (50 Pac. Rep. 1088). Where a receiver has been appointed, pending a controversey between a lessor and a lessee, it is error for the court to order him to

pay out of the rents received, debts contracted by the lessee prior to his appointment, for repairs made to the property which were not a lien thereon. *Estabrook* v. *Stevenson*, 50 Neb. 878 (69 N. W. Rep. 972). Miss. Code 1892, §§ 574, 575, 922, construed and applied—appointment of receiver on *ex parte* application—bond of party requiring appointment. *Pearson* v. *Kendrick*, 74 Miss. 285 (21 So. Rep. 37).

Sec. 740. Receivers appointed by federal courts—Suits against. Applying Act. Cong. March 3, 1887 (24 Stat. 552, ch. 373, § 3) it is held that a party may sue a receiver appointed by a federal court without permission first obtained, not only for an injury caused by his own act, but for those which result from acts of the corporation done before his appointment. *Meyer* v. *Harris*, 61 N. J. L. 83 (38 Atl. Rep. 690). Applying this statute it is held, that a suit may be brought against a receiver operating a railroad for injuries caused by fire started by it, without first obtaining leave of the court appointing the receiver. *Wall* v. *Platt*, 169 Mass. 398 (48 N. E. Rep. 270). Under §§ 2, 3, of the Act of Congress of August 13, 1888 (25 Stat. 436), amendatory of the federal judiciary act, receivers over property appointed by the United States courts, are required to manage or operate the trust property according to the laws of the state in which it is situated, and may be sued in respect to its management or operation, in the courts of such state, without the previous leave of the court appointing them; and in such cases a judgment rendered in the state court is conclusive upon the federal court as to the existence and amount of the plaintiff's claim, but the time and manner of its payment are to be controlled by the court under whose orders the receiver acts. *Reinhart* v. *Sutton*, 58 Kan. 726 (51 Pac. Rep. 221).

Sec. 741. Parties to real actions. The wife of a lessor who is not named in a lease of his lands by him, but simply signs the lease with him, is not a proper party plaintiff in an action on the lease. *Indianapolis Nat. Gas Co.* v. *Spaugh*, 17 Ind. App. 688 (46 N. E. Rep. 691). All the beneficiaries in an instrument creating a trust are necessary parties to an action to cancel it. Nev. Gen. Stat., § 3039,

construed and applied. *Robinson* v. *Kind*, 28 Nev. 330 (47 Pac. Rep. 1). Where the beneficiaries of an implied trust are known to the plaintiffs instituting a general creditor's suit against the trustee to subject his property to the payment of his debts, such beneficiaries must be made formal parties to such suit; and they are not bound by the decrees therein by reason of the publication of the general notice to lienholders, required by W. Va. Code, ch. 139. *Marshall's Ex'rs* v. *Hall*, 42 W. Va. 641 (26 S. E. Rep. 300). A party charged with participation in the execution of a forged deed, by taking a false and fraudulent certificate of acknowledgment as a notary public, is a proper party defendant to an action to cancel the deed. *Alexander* v. *Davis*, 42 W. Va. 465 (26 S. E. Rep. 291). A provision in a city charter (Wash. Laws 1885–86, p. 243, § 10) that in the foreclosure of an assessment lien for improvements "it shall be a sufficient statement of the cause of action to allege * * * the names of each person having an interest in the premises," does not make the holder of a mortgage on the premises a necessary party to such suit. *Krutz* v. *Gardner*, 18 Wash. 332 (51 Pac. Rep. 397). A principal and his agent operating a mine, who are guilty of encroachment upon an adjoining mine, may be joined as defendants in an action for an injunction and an accounting. *United Coal Co.* v. *Canon City Coal Co.*, 24 Colo. 116 (48 Pac. Rep. 1045). Where a will devises a life estate, making no disposition of the fee, but directs the executor to convert the estate into money upon the death of the life tenant and distribute the proceeds among certain legatees, the testator's heirs are necessary parties defendant to an action to compel the executor to exercise this power. *Wooster* v. *Cooper*, 56 N. J. Eq. 759 (36 Atl. Rep. 281).

Sec. 742. Sufficiency of complaint. Where several plaintiffs join, the complaint must state a joint cause of action in favor of all of them. *Indianapolis Nat. Gas Co.* v. *Spaugh*, 17 Ind. App. 688 (46 N. E. Rep. 691). A complaint for relief on account of mistake need not specifically allege that the relief sought is founded upon mistake, but it is sufficient to allege facts which show clearly that either a

mutual mistake has been made, or a fraud committed. *Hull* v. *Watts*, 95 Va. 10 (27 S. E. Rep. 829). It is not necessary for a bill in equity to allege that the plaintiff has not a "plain, adequate and complete remedy at law." *Goodwin* v. *Smith*, 89 Me. 506 (36 Atl. Rep. 997); *Borie* v. *Satterthwaite*, 180 Pa. St. 542 (37 Atl. Rep. 102). A complaint for damages on account of failure of title, which relies upon a judicial determination of such failure, must show that the plaintiff has exhausted every available judicial means of sustaining his title. *Puckett* v. *Waco Abstract & Inv. Co.*, 16 Tex. Civ. App. 329 (40 S. W. Rep. 812). Failure of a complaint in an action on a lease to definitely describe the premises, cannot be taken advantage of by a defendant lessee on account of whose fault the boundaries were never determined as provided for by the lease. *Indianapolis Nat. Gas Co.* v. *Spaugh*, 17 Ind. App. 688 (46 N. E. Rep. 691).

Sec. 743. Sufficiency of answer. A court will not refuse to hear a defense based upon an event which has happened since the filing of the bill, unless something in the contract, the relations of the parties, or in the subject-matter of the suit is of a character to cut off the new defense. *Hall* v. *Home Bldg. Co.*, 56 N. J. Eq. 304 (38 Atl. Rep. 447). Where a railroad company pleads as a defense to an action brought against it, on account of its embankments obstructing the flow of surface water, that more than ten years prior to the injury, the embankments were constructed and have been maintained ever since in the same condition, the pleading is insufficient without further alleging that like effects resulted at intervals during the ten years, without complaint from plaintiff. *Shahan* v. *Alabama Great Southern R. Co.*, 115 Ala. 181 (22 So. Rep. 449).

Sec. 744. Cross complaint—Amendments. In an action to restrain a judgment creditor from executing his judgment on lands alleged to be held by the judgment debtor in trust for the complainants, the defendant may, by cross bill, seek to have the trust declared void. *Manley* v. *Mickle*, 55 N. J. Eq. 563 (37 Atl. Rep. 738). Ky. Code, § 134, applied—amendment of warrant in action for forcible entry and

detainer. *Bailey* v. *Kelley*, Ky. (38 S. W. Rep. 139). Ala. Code 1886, § 3449, applied—amendments. *Stein* v. *McGrath*, 116 Ala. 593 (22 So. Rep. 861); *Truss* v. *Miller*, 116 Ala. 494 (22 So. Rep. 863). Or. Code, § 101, construed and applied—amendment of pleadings. *Talbott* v. *Garretson*, 31 Or. 256 (49 Pac. Rep. 978). Particular case in which amendments were allowed. *Lookabaugh* v. *La Vance*, 6 Okla. 858 (49 Pac. Rep. 65).

Sec. 745. Recovery of attorney's fees—Costs. A contract to pay attorney fees, valid in the state where made, will not be enforced by the courts of a state where such contracts are held to be void. *Clark* v. *Tanner*, 100 Ky. 275 (38 S. W. Rep. 11). The court say: "But it is a safe position that comity should not nor does require a contract made in one state to be enforced by the courts of another state that treats a similar one as absolutely void because it is an agreement to pay a penalty, tends to oppress the debtor and encourages litigation." The same principal is applied by the supreme court of Texas to a usurious contract. *Building & Loan Ass'n* v. *Griffin*, 90 Tex. 480 (39 S. W. Rep. 656). Where the issue involved in an action is the extent of a plaintiff's interest in lands, his attorneys are not entitled to an allowance for fees, as in the case of partition, on account of the fact that, after the decree establishing the interest of the parties in the land they divided the land accordingly between themselves. *Everett* v. *Croskrey*, 101 Ia. 17 (69 N. W. Rep. 1125). Ga. Code, § 1989, construed and applied—attorney's lien for services rendered in the recovery of property—priority. *Lovett* v. *Moore*, 98 Ga. 158 (26 S. E. Rep. 498). Neb. Code, § 618, construed and applied—disclaimer by defendant—right to recover costs. *Fowler* v. *Brown*, 51 Neb. 414 (71 N. W. Rep. 54).

Sec. 746. New trial of right—Statutes construed. Colo. Civ. Code, § 272, construed and applied—granting new trial in action of ejectment upon payment of costs. *Schwed* v. *Hartwitz*, 28 Colo. 187 (47 Pac. Rep. 295; 58 Am. St. Rep. 221). Construing and applying Ind. Rev. Stat. 1894, §§ 1062–1069, 1076, it is held that whee, in an action to quiet

title and to recover possession, a defendant disclaims "any estate or interest in the real estate," and the only question involved is the right to possession, it is error to grant a new trial as of right. *Thompson* v. *Kreisher*, 148 Ind. 573 (47 N. E. Rep. 1059). Ind. Rev. Stat. 1894, § 1076, giving a new trial as of right in actions to quiet title or in actions for ejectment, does not apply where the plaintiff has associated with any such action and prosecuted it to final judgment, a cause of action in which a new trial as of right is not allowed. *Seisler* v. *Smith*, 150 Ind. 88 (46 N. E. Rep. 998). Where the purpose of the action is merely to enforce or cancel a lien, incumbrance or contract, the statute as to new trial as a matter of right does not apply. *Board of Com'rs* v. *Plotner*, 149 Ind. 116 (48 N. E. Rep. 635). Minn. Gen. Stat. 1894, § 5845, construed and applied—granting of new trial as of right. *McRoberts* v. *McArthur*, 69 Minn. 506 (72 N. W. Rep. 796), Okla. Code, § 618, providing for a new trial as a matter of right in an action of ejectment, does not apply where a judgment by default is taken in favor of the plaintiff and no issue has been raised by the defendant as to the right of the plaintiff to the possession of the land. *Province* v. *Lovi*, 4 Okla. 672 (47 Pac. Rep. 476).

Sec. 747. Judgments — Miscellaneous notes. An order of court that defendant pay to plaintiff a certain sum, which stipulates that the amount so found due plaintiff shall not bear interest, that execution shall not issue thereon, and that no lien therefor shall attach to the real estate of defendant, is not a final judgment. *State* v. *Klein*, 140 Mo. 502 (41 S. W. Rep. 895). Utah Const., art. 8, § 9, construed and applied—"final judgment" defined. *Watson* v. *Mayberry*, 15 Utah 265 (49 Pac. Rep. 479). Where a bill to review a judgment of foreclosure is granted to one of several defendants and the judgment held void as to him, the decree is binding upon the other defendants, and if the defendant to whom the decree is granted purchases their interests, he holds, as to them, subject to the decree. *Tate* v. *Hamlin*, 149 Ind. 107 (47 N. E. Rep. 5). For discussion as to the conclusiveness of a judgment of the court of the Creek Nation, see *Barbee* v. *Shannon*, Ind. Ter. (40 S. W. Rep. 584). Hill's

Ann. Wash. Stat., Vol. 2, § 221, construed and applied—relief from judgment taken against one through his mistake, inadvertence, surprise or excusable neglect. *Hull* v. *Vining*, 17 Wash. 352 (49 Pac. Rep. 537).

Sec. 748. Appeals—Statutes construed. Upon an appeal to the supreme court of Kansas from an order of the district court confirming a sheriff's sale, the purchaser thereat is a necessary party. *McDonald* v. *Citizens' Nat. Bank*, 58 Kan. 461 (49 Pac. Rep. 595). Under Ill. Rev. Stat., ch. 87, § 25, giving a right of appeal to the supreme court when a freehold is involved, it is held that a freehold is involved in proceedings to assign dower, *Doty* v. *Irwin*, 168 Ill. 50 (47 N. E. Rep. 768); in an action to set aside a conveyance on the ground of fraud, *Hand* v. *Waddell*, 167 Ill. 402 (47 N. E. Rep. 772); and where the controversy is as to the existence of a perpetual easement, *Village of Crete* v. *Hewes*, 168 Ill. 330 (48 N. E. Rep. 86). Construing a statute (Ind. Rev. Stat. 1894, §§ 3808, 3809, Laws 1891, p. 137) limiting the right of appeal in annexation proceedings to "resident freeholders in the territory sought to be annexed," it is held that only citizens and freeholders of the annexed territory can appeal, and a railroad company whose lands are affected cannot appeal although it has a master mechanic's office, with construction and repair shops within the annexed territory, and an office and place of business within the city, outside of the territory. *Pittsburg, C., C. & St. L. Ry.* v. *City of Indianapolis*, 147 Ind. 292 (46 N. E. Rep. 641). Ia. Code 1873, § 3186, applied—effect of filing appeal bond in action for possession. *Hyatt v. Clever*, 104 Ia. 338 (73 N. W. Rep. 831). Neb. Code Civ. Proc., § 677, subd. 8, construed and applied—issuing *supersedeas*. *Penn Mutual Life Ins. Co.* v. *Creighton Theater Bldg. Co.*, 51 Neb. 659 (71 N. W. Rep. 279). Hill's Ann. Or. Laws, § 537, construed and applied—notice of appeal to "adverse party." *Cooper Mfg. Co.* v. *Delahunt*, Or. (51 Pac. Rep. 649). Wash. Laws 1893, p. 121, § 5, construed and applied—time given for taking appeal. *Griffith* v. *Seattle Nat. Bank Bldg. Co.*, 16 Wash. 329 (47 Pac. Rep. 749).

Sec. 749. Appeals—Reversal of judgment. Wash. Laws 1893, p. 132, § 27, providing that "property acquired

by a purchaser in good faith under a judgment subsequently reversed shall not be affected by such reversal," does not protect the title of a vendee of a purchaser at an execution sale whose title is based on a sheriff's certificate of sale. *Singley* v. *Warren*, 18 Wash. 434 (51 Pac. Rep. 1066; 68 Am. St. Rep. 896). For particular case determining the rights of lienholders upon reversal of a decree establishing their rank, see *Keck* v. *Allender*, 42 W. Va. 420 (26 S. E. Rep. 437).

Sec. 750. Miscellaneous notes. A curative statute enacted after the institution of their suits, cannot affect the rights of parties litigant. *Turner* v. *Town of Pewee Valley*, 100 Ky. 288 (38 S. W. Rep. 143, 688). In an action to establish a lost deed, it is immaterial that the deed was made in pursuance of an illegal or nonenforcible contract, at least, unless the deed was voidable even if it had not been lost. Where, in such an action, the former existence of the lost deed is denied, the evidence to establish it must be strong and satisfactory. *Towle* v. *Sherer*, 70 Minn. 312 (73 N. W. Rep. 180). Particular evidence held insufficient to establish a lost deed. *Stovall* v. *Judah*, 74 Miss. 747 (21 So. Rep. 614). Where, in a proceeding to compel one to open a passway which the plaintiff claims the right to use as an easement, he shows a use of it by the public for forty years, the defendant has the burden of showing that such use was merely permissive. A judgment for the plaintiff in such an action need not define the boundary of the way with the same particularity as in the case of the boundaries of a new way. *Burch* v. *Blair*, Ky. (41 S. W. Rep. 547). Where one's property rights are injuriously affected by the passage of a city ordinance, in the exercise of its governmental power, his remedy is not by an action at law to recover damages, but is by some proceeding to restrain the action of the city from interfering with his legal rights. *Stevens* v. *City of Muskegon*, 111 Mich. 72 (69 N. W. Rep. 227; 36 L. R. A. 777). Where a lot owner is prevented from erecting a building thereon by an overhanging wall of his neighbor, he is entitled to recover as damages the net rental value of the premises for the period for which the construction of his building was delayed by the failure of such adjoining owner to remove the interfering wall.

Buruss v. *Hines*, 94 Va. 413 (26 S. E. Rep. 875). Mill & V. Tenn. Code, § 3650, subd. 5, construed and applied—pleading the statute of limitations. *Ferring* v. *Fleischman*, Tenn. (39 S. W. Rep. 19). W. Va. Code, 1891, ch. 139, construed and applied—enforcement of liens—effect of payments—parties. *Shumate's Ex'rs* v. *Crockett*, 48 W. Va. 491 (27 S. E. Rep. 240).

REAL ESTATE AGENT.

EPITOME OF CASES.

Sec. 751. Authority of real estate agent—Revocation. The employment of a broker to procure a purchaser for lands, does not confer authority to bind the owner to sell by a contract in writing. *Scull* v. *Brinton*, 55 N. J. Eq. 489 (37 Atl. Rep. 740). A letter from a property owner to a real estate broker stating the minimum price he will take for his property and that the agent may have all above that sum, is merely an authority to find a purchaser and does not authorize the broker to bind the owner by a contract of sale. *Campbell* v. *Galloway*, 148 Ind. 440 (47 N. E. Rep. 818). The authority of an agent to sell land, does not, *per se*, confer authority to cancel a trade without the principal's knowledge so as to relieve the purchaser. *West End Hotel & Land Co.* v. *Crawford*, 120 N. C. 847 (27 S. E. Rep. 31). Authority given one as agent to negotiate for a sale or exchange of lands, does not confer an implied authority to enter into a contract of exchange. *Holmes* v. *Redhead*, 104 Ia. 399 (73 N. W. Rep. 878). Citing, *Furst* v. *Tweed*, 93 Ia. 300 (61 N. W. Rep. 857); *O'Reilly* v. *Keim*, 54 N. J. Eq. 418 (34 Atl. Rep. 1073); *Duffy* v. *Hobson*, 40 Cal. 240 (6 Am. Rep. 617); *Everman* v. *Herndon*, 71 Miss. 823 (15 So. Rep. 135); *Halsey* v. *Monteiro*, 92 Va. 581 (42 S. E. Rep. 258). A real estate broker who is merely offered a commission to find a purchaser, has no authority to bind the owner by representations or contract, or by the granting of possession or the making of repairs; and a letter from him accepting the owner's offer to

sell which recites that his purchaser understands that the property is of certain dimensions, does not vary the terms of the offer. *Planer* v. *Equitable Life Assur. Soc.*, N. J. Eq. (37 Atl. Rep. 668).

An agent and general manager of a corporation with full power and authority as declared in the order of his appointment "to manage and control the business of the corporation," may execute a mortgage upon its property in the name of the corporation to secure the payment of indebtedness contracted in the management of the business. *Thayer* v. *Nehalem Mill Co.*, 31 Or. 487 (51 Pac. Rep. 202). Particular case in which one co-owner of a mining claim was held authorized as the agent of another co-owner to bind him by a contract compromising a controversy with third persons as to the ownership of the claim. *Hagerman* v. *Bates*, 24 Colo. 71 (49 Pac. Rep. 189). Particular evidence held sufficient to show that an owner authorized a sale of land by her general agent. *Rovelsky* v. *Scheuer*, 114 Ala. 419 (21 So. Rep. 785). The selection of a trustee to take title to property purchased for a syndicate, and to give a deed of trust thereon for a part of the purchase price, is not within the implied authority of real estate agents who are members of, and who formed, the syndicate. A purchase of lands by real estate agents on behalf of a syndicate of which they are members, when the agents are also secretly acting as agents of the vendor, cannot be enforced against the other members of the syndicate. A usage or custom of real estate agents in a certain city to get up syndicates to buy property in their hands for sale will not bind members of a syndicate who have no knowledge thereof, especially if they lived at other places, so as to sustain a purchase of property for the syndicate made by such agents, who are also acting as secret agents of the vendor. *Ferguson* v. *Gooch*, 94 Va. 1 (26 S. E. Rep. 397; 40 L. R. A. 234).

A contract, by which a landowner employs a broker as his exclusive agent for the sale of his property for a specified time which does not bind the agent to do anything, but gives him a right to a commission on any sale of the property during such time, lacks mutuality and is revocable at any time before the agent procures a purchaser; and the agent cannot recover

a commission for a sale made by the owner. *Kolb* v. *Bennett Land Co.*, 74 Miss. 567 (21 So. Rep. 283).

Sec. 752. Liability of loan agent for negligence. Where one carrying on the business of a loan agent was engaged by another to loan his money on first mortgage security, loaned it, and took a mortgage on real estate without procuring an abstract of title or having the title examined, and without even inquiring whether or not there was any prior incumbrance on the property, was held guilty of negligence in making the loan. *Hardwick* v. *Ickler*, Minn. (78 N. W. Rep. 519).

Sec. 753. As to when a commission is earned, due and payable. A broker employed to secure a loan, is entitled to his commission when he has procured a lender who is ready, willing and able to lend the money upon the terms proposed. *Secor* v. *Patterson*, 114 Mich. 87 (72 N. W. Rep. 9). In order for a real estate agent to recover a commission, he must show either a completed sale or one negotiated in compliance with the authority conferred upon him by the owner. *Hurd* v. *Neilson*, 100 Ia. 555 (69 N. W. Rep. 867). He is not entitled to a commission until he has furnished a purchaser for the property willing and able to buy it upon such terms and at the price prescribed by the vendor. *Stewart* v. *Smith*, 50 Neb. 681 (70 N. W. Rep. 285); *Crook* v. *Forst*, 116 Ala. 395 (22 So. Rep. 540). Procuring an offer for a larger sum, but which does not comply with the principal's terms as to payments, does not entitle the agent to a commission. *Smith* v. *Allen*, 101 Ia. 608 (70 N. W. Rep. 694). Where an agent fails to consummate a transaction entitling him to a commission on account of the fault of his employer, he is entitled to recover his commission. *Washburn* v. *Bradley*, 169 Mass. 86 (47 N. E. Rep. 512); *Fenn* v. *Ware*, 100 Ga. 568 (28 S. E. Rep. 288). A real estate broker who simply advised the owner of property who desired to sell the same that he had a "customer" for the property and subsequently introduced the parties to each other and they consummated a sale, is not entitled to recover a commission from the seller, there being no other facts upon which to base an implied

contract by him to pay a commission. *Weinhouse* v. *Cronin*, 68 Conn. 250 (36 Atl. Rep. 45). Where a broker who has no interest in the lands agrees to pay other brokers a specified sum if they will sell the same at a specified price, he is not liable for commission on a sale made at a less price. *Whitcomb* v. *Dickinson*, 169 Mass. 16 (47 N. E. Rep. 426). Where one owning lands with two others, represents to a broker that he has authority to act in regard to the sale of the lands and engages him to find a purchaser upon certain terms, he is liable to such broker for his commission, where he procures a purchaser for the propery on the terms mentioned. *Oliver* v. *Morawetz*, 97 Wis. 332 (72 N. W. Rep. 877). Where one firm of real estate brokers agrees to pay another firm a certain commission on sales of land in a certain county, to customers "procured" by the latter, a commission may be recovered for a sale consummated through the efforts of a third person employed by the latter firm, without the knowledge of their employers. *Boyd* v. *Watson*, 101 Ia. 214 (70 N. W. Rep. 120). Where a broker's contract provides that he is to have a regular commission for selling property "out of the first money received" from the sale, he cannot recover his commission until there has been a payment made by the vendee, although he may have caused the parties to agree to the terms of a contract of sale which was subsequently abandoned by them. *Lindley* v. *Fay*, 119 Cal. 289 (51 Pac. Rep. 333). A joint contract by several persons owning lands as tenants in common agreeing to pay a broker a certain sum per acre if he will sell the land or portions thereof, was held not to entitle him to a commission upon the transfer of an undivided interest among themselves or to third persons. *Johnson* v. *Sirret*, 153 N. Y. 51 (46 N. E. Rep. 1035). Particular case in which an agent was held not entitled to recover a commission. *Cobb.* v. *Kenner*, Tenn. (42 S. W. Rep. 277). For construction of particular contract to pay a commission for procuring a lease, see *Ryer* v. *Oesting*, 119 Cal. 564 (51 Pac. Rep. 857).

Sec. 754. Right to commission on sale consummated by the owner or a third party. Where a broker attempts to make a sale to a purchaser who is introduced to him by the owner but fails, he is not entitled to recover a

commission on account of a sale subsequently made by the owner to such purchaser at a reduced price, after the owner has withdrawn his property from the broker's hands. *Mallonee* v. *Young*, 119 N. C. 549 (26 S. E. Rep. 141). In the case of *Crook* v. *Forst*, 116 Ala. 895 (22 So. Rep. 540), the supreme court of Alabama say: "The owner of real property, by employing a real estate agent or broker to effect a sale of the property, does not thereby preclude himself from employing other agents for the same purpose, or from effecting a sale himself, provided that in making the sale himself he acts in good faith. The owner of the property would not be permitted to avail himself of the services of an agent, who procured a purchaser, to effect a sale himself to such purchaser, and thereby deprive the agent of his commission; nor could he effect such sale at a small reduction from the price at which the agent was authorized to find a purchaser, nor make immaterial changes in the terms of the sale, if the purpose of the reduction was merely to save the commission agreed to be paid to the agent. The owner, however, has a right to fix a net value upon his property, and the terms of the sale; and if the agent cannot effect a sale, so that the owner may realize such net value, or upon the terms fixed, the owner has the power to dispose of the property at such price and at such terms. Fair dealing between the parties would demand of the owner that he disclose his intention to the agent, before concluding the sale to a purchaser procured by the agent." An agreement by a landowner to pay a broker a commission if he would effect a sale of his property, does not entitle the broker to a commission for merely calling a purchaser's attention to the fact that the property is for sale, where all the negotiations leading up to the consummation of the sale were carried on independently by another agent. *Greene* v. *Owings*, Ky. (41 S. W. Rep. 264). Particular fact case in which a broker was held not entitled to a commission on a sale consummated by another broker. *Crowninshield* v. *Foster*, 169 Mass. 237 (47 N. E. Rep. 879).

Sec. 755. Actions to recover commissions—Defenses—Evidence. Where the contract does not fix the amount of commission, a recovery may be had on *quantum meruit*.

Nyhart v. *Pennington*, 20 Mont. 158 (50 Pac. Rep. 413). In an action by a broker to recover a commission for negotiating a purchase of real estate, he is not entitled to recover an attorney fee for services rendered in a suit involving the right of a vendor to make the sale, the existence of which right was necessary in order for him to earn his commission. *Schamberg* v. *Auxier*, Ky. (40 S. W. Rep. 911). Where a complaint alleges an agreement for a commission on sale of real estate, and the proof shows an exchange, the variance is not fatal, it not appearing that the defendant was misled. *Whitaker* v. *Engle*, 111 Mich. 205 (69 N. W. Rep. 493). In an action upon an express contract, a verdict resting upon proof of an implied contract will not be disturbed where no objection to the evidence was made at the trial. *Nyhart* v. *Pennington*, 20 Mont. 158 (50 Pac. Rep. 413). It is a defense to an action to recover commission for making a sale to show that the agent subsequently accepted employment from the purchaser to defeat the enforcement of the contract of sale. *Ashner* v. *Beckner*, Ky. (41 S. W. Rep. 85). It is no defense to a suit to recover a commission for the sale of real estate that the person who places the property in the hands of the real estate agent or broker for sale is not the owner of the property, or that there is a defective title thereto; and the fact that a real estate agent may seek to induce the owner of property to accept a less price than he has authorized the agent to sell the property for does not cause a forfeiture of the agent's commission, even though the agent might know, or have reason to believe, he could obtain the owner's price for the property. *Gorman* v. *Hargis*, 6 Okla. 360 (50 Pac. Rep. 92).

The agency cannot be established by the agent's declarations, but he may testify to the fact of his agency. *Nyhart* v. *Pennington*, 20 Mont. 158 (50 Pac. Rep. 413). To show that a sale consummated by the owner was the result of a broker's efforts, he may show his negotiations and interviews had with the purchaser in endeavoring to sell the land to a corporation in which he was a stockholder, the landowner having notice of such negotiations and interviews. *Brooks* v. *Leathers*, 112 Mich. 463 (70 N. W. Rep. 1099). In an action by a broker to recover commissions for negotiating a

sale where no contract was made in regard thereto, he may prove a local custom as to the rate of commissions charged by real estate agents and as to the time when such commissions become due and payable. *Hansbrough* v. *Neal*, 94 Va. 722 (27 S. E. Rep. 593). For cases determining particular questions as to the admissibiltiy of evidence in actions for commissions, see *Oliver* v. *Morawetz*, 95 Wis. 1 (69 N. W. Rep. 977); *Goin* v. *Hess*, 102 Ia. 140 (71 N. W. Rep. 218). Particular evidence in an action by a broker to recover a commission held sufficient to authorize the submission of the right to recover to the jury. *Anderson* v. *Wedeking*, 102 Ia. 446 (71 N. W. Rep. 360). Particular evidence held sufficient to support the recovery of a commission. *Hiltz* v. *Williams*, 167 Mass. 454 (45 N. E. Rep. 762); *Hosmer* v. *Fuller*, 168 Mass. 274 (47 N. E. Rep. 94); *Brooks* v. *Leathers*, 112 Mich. 468 (70 N. W. Rep. 1099.

Sec. 756. Miscellaneous notes. Where the title bond is given to several joint purchasers, each is bound for the whole commission due to a broker negotiating the purchase for them. *Schamberg* v. *Auxier*, Ky. (40 S. W. Rep. 911). A broker selling land belonging to a husband and wife, cannot recover from the husband pay for selling the wife's interest in the land in the absence of an agreement to that effect. *Hansbrough* v. *Neal*, 94 Va. 722 (27 S. E. Rep. 593). Where, as their commission for procuring contracts of purchase in which the purchase price was to be paid in installments, a firm of brokers agreed to accept a portion of the installments as paid for their commission, and the contract fixed their rights in forfeited installments and provided for their receiving a commission in case of a re-sale after the forfeiture of the contracts, it is held that upon the forfeiture of the contracts the unpaid commissions for the original sales were also forfeited. *Holbrook* v. *Investment Co.*, 30 Or. 259 (47 Pac. Rep. 920). As to the rights of a broker upon the cancellation of a contract of sale negotiated by him, where he has agreed to receive a certain percentage of payments to be made by the vendee out of the earnings of the property, see *Bishop* v. *Averill*, 17 Wash. 209 (49 Pac. Rep. 287; 50 Pac. Rep. 1024). For construction of particular

contract held to give a broker the exclusive right to sell for a specified period and a right to a commission on any sale made within the time, see *Metcalf* v. *Kent*, 104 Ia. 487 (73 N. W. Rep. 1037). In Alabama "each person, firm or corporation engaged in buying, selling or renting real estate on commission" is required to pay a license tax. Laws 1899, p. 191.

RECORDS AND RECORDING.

EPITOME OF CASES.

Sec. 757. What instruments may be recorded—Recording wills. Where an acknowledgment of a deed by two persons is good as to one of them it is admissible to record. *Rork* v. *Shields*, 16 Tex. Civ. App. 640 (42 S. W. Rep. 1032). Construing and applying Md. Laws 1831, ch. 205, § 8, providing that "all the writings obligatory or contracts for conveyances of lands or of any interest or estate of, in or relating to lands" may be recorded if duly executed or acknowledged, it is held that such a contract by which one of the parties thereto agrees to sell and the other to buy real estate, may be recorded. *South Baltimore Harbor & Imp. Co.* v. *Smith*, 85 Md. 537 (37 Atl. Rep. 27). Construing Ind. Rev. Stat. 1894, § 2763, concerning the filing and recording of foreign wills, which provides that a copy of the will and probate may be produced by any person interested therein to the circuit court of the county in which there is any real estate upon which the will may operate, it is held that a formal petition need not be filed in such a proceeding and the person interested in the will is not required to appear in person and produce the will; this may be done by his agent or attorney, as in other cases. *Evansville Ice & Cold-Storage Co.* v. *Winson*, 148 Ind. 682 (48 N. E. Rep. 592).

Sec. 758. What constitutes recording. Applying S. Dak. Comp. Laws, § 3272, providing that "an instrument is deemed to be recorded when, being duly acknowledged or proved and certified, it is deposited in the register's office with

the proper officer for record," it is held that where a deed so executed as to be entitled to record is duly deposited with the register and filed by him for record, its operation as a recorded instrument is not affected by the fact that the grantee's agent without authority has the deed returned to him before it is spread upon the record. *Parrish* v. *Mahany*, 10 S. Dak. 276 (73 N. W. Rep. 97; 66 Am. St. Rep. 715). Where there are two deeds between the same parties filed for record at the same time, the notation for record of the second deed, required by Mill & V. Tenn. Code, §§ 2887, 2888 (Shannon's Code, §§ 3749, 3750), may properly be made by the use of "ditto marks." *Hughes* v. *Powers*, 99 Tenn. 480 (42 S. W. Rep. 1).

Sec. 759. Records as notice. All persons claiming an interest in or lien upon real estate are bound to take notice of the recitals in a duly recorded deed in the chain of title of their grantor. *Hubbard* v. *Knight*, 52 Neb. 400 (72 N. W. Rep. 473); *Gilchrist* v. *Foxen*, 95 Wis. 428 (70 N. W. Rep. 585). The record of an instrument not entitled to be recorded does not impart notice of its contents. *McKeown* v. *Collins*, 38 Fla. 276 (21 So. Rep. 103); *Sherod* v. *Ewell*, 104 Ia. 253 (73 N. W. Rep. 493). The record of a mortgage, the certificate or acknowledgment of which is void, because it shows *prima facie* that the acknowledgment was taken by the mortgagee, does not impart notice. *Lee* v. *Murphy*, 119 Cal. 364 (51 Pac. Rep. 549). A purchaser from a trustee whose title is recorded, is charged with notice of everything contained or recited in the trust deed. *McDonald* v. *Quick*, 139 Mo. 848 (41 S. W. Rep. 208). A deed re-recorded after the addition thereto of a necessary omitted certificate, takes effect as to the grantor's creditors from the date of the last recording. *Citizens' Bank* v. *McCarty*, 99 Tenn. 469 (42 S. W. Rep. 4). The record of a trust deed by a grantee is notice to the trustee and beneficiary, although the conveyance to the grantee has not been recorded. *Stovall* v. *Judah*, 74 Miss. 747 (21 So. Rep. 614). A duly recorded deed is notice of the title of the owner, to a person who buys timber on the land from another person. *Alliance Trust Co.* v. *Nettleton Hardwood Co.*, 74 Miss. 584 (21 So. Rep. 396; 60 Am. St. Rep. 531; 36 L. R. A. 155). The record of a vendor's lien is not sufficient to put

the subsequent grantee on inquiry or suggest the existence of secret or unknown liens to his prejudice. *Yancey* v. *Blakemore*, 95 Va. 263 (28 S. E. Rep. 336). The record of a conveyance by two brothers to a third brother of their title, to what appears to be a third of a piece of land owned by the three as tenants in common under their father's will, which appears of record, does not charge a purchaser searching the record with notice of their previous partition of the land by mutual release deeds, two of which have not been recorded. *H. C. Tack Co.* v. *Ayers*, 56 N. J. Eq. 56 (38 Atl. Rep. 194). The holder of a duly recorded mortgage will not be charged with constructive notice of other instruments afterwards filed for record. *Waughop* v. *Bartlett*, 165 Ill. 124 (46 N. E. Rep. 197. Where the record of a deed shows the date of its execution, it is notice of any incumbrances or changes of title affecting the grantee's title, made since its execution, although they were recorded prior to the recording of such deed. *Coleman* v. *Reynolds*, 181 Pa. St. 317 (37 Atl. Rep. 543). A purchaser of real property from one who appears of record to have the title is not required to examine for mortgages made to the latter after he became the owner, nor is the record of such a mortgage conclusive notice to the purchaser of a prior unrecorded deed made by his grantor to the mortgagor. *Sternberger* v. *Ragland*, 57 O. St. 148 (48 N. E. Rep. 811). In Louisiana it is held that a sheriff's act of sale, stating compliance by the purchaser with the terms of sale, spread on the public records, will protect a *bona fide* mortgagee who acquires his mortgage for value from the recorded owner on the faith of his title. *Baker* v. *Lee*, 49 La. 874 (21 So. Rep. 588). How. Ann. Mich. Stat., § 5727, construed and applied—effect of curative statutes making the record of certain defective instruments notice of the rights secured thereby. *Lariverre* v. *Rains*, 112 Mich. 276 (70 N. W. Rep. 583).

Sec. 760. Records as notice—Two deeds of same land by same grantor—Rights of mortgagee under junior deed prior in record. Where the same grantor had separate deeds executed at different times for the same real estate to two different persons, one who accepts a mortgage from the junior grantee whose conveyance was first recorded, after the

recording of both the deeds, although he had no notice of the prior deed, has not a valid title as against the grantee of the first deed executed, unless his mortgagor was a *bona fide* purchaser from the original grantor. *Parrish* v. *Mahany*, 10 S. Dak. 276 (73 N. W. Rep. 97; 66 Am. St. Rep. 715). Citing, *Fallass* v. *Pierce*, 30 Wis. 443; *Erwin* v. *Lewis*, 32 Wis. 276, and expressly approving the case of *Woods* v. *Garnett*, 72 Miss. 78 (16 So. Rep. 390), epitomized at length in Ballards' Law of Real Property, Vol. IV, § 715.

Sec. 761. Unrecorded deeds and mortgages. Unrecorded instruments affecting the title of land, even though entitled to record, are valid between the parties. Mill. & V. Tenn. Code, § 2837, applied. *King* v. *Coleman*, 98 Tenn. 561 (40 S. W. Rep. 1082). In North Dakota it is provided by statute that "An unrecorded instrument is valid as between the parties thereto and those who have notice thereof; but knowledge of the record of an instrument out of the chain of title does not constitute such notice." Laws 1899, p. 239. Construing and applying Mill. & V. Tenn. Code, §§ 2837, 2887, 2891, it is held that registration is not necessary in order for a deed executed by husband and wife to be binding upon the parties. *Cox* v. *Keathley*, 99 Tenn. 522 (42 S. W. Rep. 437). A *bona fide* purchaser for value without notice will be protected against an outstanding unrecorded conveyance. *Burns* v. *Weintz*, Ia. (73 N. W. Rep. 861). Where one who has no notice of an unrecorded deed takes a subsequent deed from the same grantor which he duly records, he has a superior title. *Riddle* v. *Armstrong*, 179 Pa. St. 263 (36 Atl. Rep. 226). An unrecorded deed will prevail over a subsequent judgment taken against the grantor. *Stanhilber* v. *Graves*, 97 Wis. 515 (73 N. W. Rep. 48). Construing Okla. Stat. 1893, ch. 21, § 13, providing that all deeds, conveyances and agreements which the statute requires to be recorded shall take effect from and after the filing thereof for record, "as to subsequent *bona fide* purchasers, and incumbrances by mortgages, judgment or otherwise," it is held that a judgment rendered against a grantor after his execution of an unrecorded deed, has priority over such deed regardless of whether the judgment creditor had actual notice of such con-

veyance or not. *Lewis* v. *Atherton*, 5 Okla. 90 (47 Pac. Rep. 1070). See opinion for exhaustive review of statutes and decisions of other states. A purchaser of a reversion who takes a formal assignment of an unrecorded lease, takes subject to it. *McCardell* v. *Williams*, 19 R. I. 701 (36 Atl. Rep. 719). An assignee of a vendor in an unrecorded land contract holds subject to a subsequent mortgagee of such vendor, although the vendee was in possession of the land. *First Nat. Bank* v. *Chafee*, 98 Wis. 42 (73 N. W. Rep. 318). Where the holder of a junior deed takes his title without notice of an outstanding senior conveyance and records it within the time required by law, he is entitled to prevail against such senior deed, which was not recorded within the time required by law. *Wise* v. *Mitchell*, 100 Ga. 614 (28 S. E. Rep. 382). Construing and applying Starr & C. Ann. Ill. Stat. (2d Ed.), Vol. 1, p. 944, § 30 (see Ballards' Law of Real Property, Vol. II, § 574), providing that conveyances take effect from the time of their recording "as to all creditors and subsequent purchasers, without notice," it is held that only such creditors are protected by the statute as have liens, and as against other creditors, an unrecorded deed has priority. *Noe* v. *Moutray*, 170 Ill. 169 (48 N. E. Rep. 709).

A second mortgagee, who has knowledge of a prior unrecorded mortgage, takes subject thereto, and so does his assignee, unless it is made to appear that he took in good faith for value and without notice of the prior mortgage. *County Bank* v. *Fox*, 119 Cal. 61 (51 Pac. Rep. 11). Applying Minn. Gen. Stat. 1894, § 4180, which declares every unrecorded conveyance, by deed, mortgage or otherwise, of real estate, void as against any attachment levied thereon or judgment lawfully obtained at the suit of any party against the person in whose name the title to such land appears of record, prior to the recording of such conveyance, it is held that a real estate mortgage, executed before, but not recorded until after, the mortgagor has made an assignment for the benefit of his creditors, under the insolvency law of the state, is void as to the assignee in so far as he represents such creditors. *Kellogg* v. *Kelly*, 69 Minn. 124 (71 N. W. Rep. 924). One who takes a real estate mortgage to secure a preexisiting debt, actually and justly owing to him, without notice, actual or

constructive, of the existence of an outstanding unrecorded mortgage against such real estate, is a subsequent purchaser in good faith within the meaning of Neb. Comp. Stat., ch. 73, § 16 (see Ballards' Law of Real Property, Vol. II, § 588), which provides that deeds shall take effect and be in force from the time of their recording as to all creditors and subsequent purchasers in good faith and without notice. *Dorr* v. *Meyer*, 51 Neb. 94 (70 N. W. Rep. 543). The rights of a mortgagee under a duly executed mortgage which he entrusts to the mortgagor to place upon record, but which is withheld from record by the latter until after his death, unknown to the mortgagee, and is then recorded according to his instructions, are superior to the claims of general creditors attaching to the land after the recording of the mortgage, although they extended credit to the mortgagor in the belief that the land was unincumbered. *Herman* v. *Clark*, Tenn. (39 S. W. Rep. 873).

Sec. 762. Unrecorded purchase money mortgage. One who takes and records a mortgage from a vendee of lands, before his title deed is recorded, takes subject to a prior unrecorded purchase money mortgage given at the time the land was purchased and subsequently recorded at the same time the vendee's title deed was recorded. *Continental Inv. & L. Soc.* v. *Wood*, 168 Ill. 421 (48 N. E. Rep. 221). The court quotes approvingly from Jones, Mortg., § 568, as follows: "A vendor of real estate who records his mortgage at the same instant that the deed from him is recorded has no occasion to examine the record for incumbrances created by his vendee upon the property prior to the recording of his deed. If there be delay in recording such deed and mortgage, and the vendee executes another mortgage of the property to a stranger, and this is recorded before the deed to the vendee and his mortgage for the purchase money are recorded, the recording of the mortgage to such third person is not notice to the vendor, because at that time the deed to the vendee had not been recorded."

Sec. 763. What constitutes notice of an unrecorded deed. One claiming under a deed, the recitals in which refer

to a prior unrecorded mortgage, takes subject thereto. *Taylor* v. *Mitchell*, 58 Kan. 194 (48 Pac. Rep. 859). Particular notice to his agent held to charge a subsequent lienholder with notice of a prior unrecorded lien. *George* v. *Butler*, 16 Utah 111 (50 Pac. Rep. 1032). Particular evidence held insufficient to establish constructive notice of an unrecorded conveyance. *Patterson* v. *Mills*, 121 N. C. 258 (28 S. E. Rep. 368). Particular recitals in a deed held insufficent to charge the grantee with knowledge of an unrecorded deed executed by the grantor's grantor thirty-one years before the deed to the grantee was executed. *Paul* v. *Kerswell*, 60 N. J. L. 273 (37 Atl. Rep. 1102). Ala. Code, § 1810, applied—particular facts held insufficient to constitute notice of an unrecorded conveyance. *Griffin* v. *Hall*, 115 Ala. 647 (22 So. Rep. 156). Cal. Civ. Code, §§ 18, 19, 1217, applied—force and effect of prior unrecorded mortgage—what constitutes notice of. *Prouty* v. *Devin*, 118 Cal. 258 (50 Pac. Rep. 380.)

Sec. 764. Miscellaneous notes and new statutes. Statutes extending the time for recording deeds are valid. *Spivey* v. *Rose*, 120 N. C. 163 (26 S. E. Rep. 701). Where an officer having the power to waive the prepayment of his fees for recording a deed, does so and accepts the deed for record, he is bound to record it. *Parrish* v. *Mahany*, 10 S. Dak. 276 (73 N. W. Rep. 97). A statute (Ky. Stat. 1894, § 791) requiring "every person operating, or that may hereafter operate a railroad in this state under a contract or lease shall have the same recorded," is not an interference with interstate commerce. *Commonwealth* v. *Chesapeake & O. Ry. Co.*, Ky. (40 S. W. Rep. 250). Tenn. Laws 1871, ch. 85, §§ 1, 2, construed and applied—liability of officer for failure to properly index records. *Maxwell* v. *Stewart*, 99 Tenn. 409 (42 S. W. Rep. 34).

In Connecticut, records made by a typewriting machine are legalized and the statute authorizes the use of typewriters in the making of records. Laws 1899, p. 28. In North Dakota, a deed to real property cannot be recorded without a certificate thereon by the county auditor to the effect that all taxes assessed against it, which are delinquent, have been paid. Laws 1899, p. 205. In Pennsylvania, after Jan. 1, 1900, con-

veyances of land in counties having a population of over five hundred thousand shall be registered in the office of the county commissioners of such county before being entered of record in the office of the recorder of deeds. Laws 1899, p. 162. Except as to titles involved in litigation at the time of the passage of the statute, defects of title to any lands in Indiana due to destruction of records by fire prior to 1857 are cured. Laws 1899, p. 219. Kan. Laws 1899, p. 206—an act concerning the restoration of mortgage records of Kearney County. Va. Code, § 2547—recording wills—amended, Laws 1897–98, p. 492. Wash. Laws 1899, p. 118—recording mixed mortgages.

TIME FOR RECORDING.

[In Vol. II, §§ 563–611; Vol. III, §§ 638–648; Vol. IV, §§ 717–722; Vol. V, §§ 746–759, will be found a compilation of the statutory provisions of the several states and territories in reference to the time for recording deeds, etc. Below we note such amendments, changes and additional constructions as have been made.]

Sec. 765. Alabama. (See Vol. II, § 563; Vol. III, § 638; Vol. V, § 746.) Code, § 1811, applies only to instruments made to secure debts and has no application to absolute deeds of conveyance; § 1810 does not affect a conveyance recorded within thirty days. *Bailey* v. *Levy*, 115 Ala. 565 (22 So. Rep. 449). For statute valididating recorded deeds which were not recorded within the time required by law, see Laws 1898-99. p. 107.

Sec. 766. Georgia. (See Vol. II, § 572.) Under Ga. Laws 1884–1885, p. 124, a deed of realty given to secure a debt, which is not recorded within thirty days from its date, is postponed to the lien of a judgment against the grantor obtained after the execution of the deed and before actual recording thereof. *Cabot* v. *Armstrong*, 100 Ga. 438 (28 S. E. Rep. 123).

Sec. 767. Illinois. (See Vol. II, § 574; Vol. V, § 749.) The statute protects only such creditors as have judgments that are liens, and for that reason it does not protect the holder of a judgment on a claim against an estate. *Noe* v. *Moutray*, 170 Ill. 169 (48 N. E. Rep. 709). It does not apply to patents issued by the United States or conveyances of land held under a treaty which requires their approval by the president of the United States. Deeds executed under such a treaty take effect and have priority in the order of their approval by the president. *Lomax* v. *Pickering*, 165 Ill. 431 (46 N. E. Rep. 238).

Sec. 768. Indiana. (See Vol. II, § 575; Vol. V, § 750.) Where a mortgage is not recorded within the forty-five days given by the statute, a subsequent mortgage duly recorded given to secure future advances has priority over the first mortgage even as to advances made after its recording. Conveyances not recorded within the time given by the statute are fraudulent and void as against *bona fide* mortgagees as a matter of law and in action by such a mortgagee to establish the priority of his lien, the court need not find the existence of fraud as a fact. *Schmidt* v *Zahrndt*, 148 Ind. 447 (47 N. E. Rep. 335). A second mortgage, duly recorded, has priority over a previous mortgage not recorded within forty-five days from its date, although such second mortgage was executed within said forty-five days. *Carson* v. *Eickhoff*, 148 Ind. 596 (47 N. E. Rep. 1067).

Sec. 769. Kansas. (Sec. Vol. II, § 577.) One holding under a deed, the recitals of which refer to a prior unrecorded mortgage, is charged with notice thereof. *Taylor* v. *Mitchell*, 58 Kan. 194 (48 Pac. Rep. 859.)

Sec. 770. Massachusetts. (See Vol. II. § 582; Vol. III, 641; Vol. IV, § 718.) The statutes applies to an assignment of a mortgage. *Swasey* v. *Emerson*, 168 Mass. 118 (46 N. E. Rep. 426; 60 Am. St. Rep. 368).

Sec 771. Minnesota. (See Vol. II, § 584.) An assignee, for the benefit of creditors, has priority over an unrecorded mortgage made by the assignor. *Kellogg* v. *Kelly*, 69 Minn. 124 (71 N. W. Rep. 924.)

Sec. 772. Nebraska. (See Vol. II, § 588; Vol. III, § 642; Vol. V, § 753.) A subsequent mortgagee of real estate is a subsequent purchaser within the statute, although his mortgage is taken to secure a preexisting debt. *Dorr* v. *Meyer*, 51 Neb. 94 (70 N. W. Rep. 543).

Sec. 773. New Jersey. (See Vol. II, § 591.) N. J. Gen. Stat., Vol. I., p. 855, § 14, providing that "every deed or conveyance of land which shall not be recorded within fifteen days after it is executed and delivered, shall be void and of no effect against a subsequent judgment creditor or *bona fide* purchaser, or mortgagee for a valuable consideration not having notice thereof," protects a judgment creditor the same as a *bona fide* purchaser and the same rules are applied to both in regard to notice. *H. C. Tack Co.* v. *Ayres*, 56 N. J. Eq. 56 (38 Atl. Rep. 194). The statute does not affect the priority of a purchase money mortgage given at the time the mortgagor acquires the property, as against his previous mortgages which were to cover after-acquired property, as it is for the protection of subsequent mortgagees only. *Daly* v. *New York & G. L. Ry. Co.*, 55 N. J. Eq. 595 (38 Atl. Rep. 202). "Every deed or instrument of the nature or description set forth in the twenty-first section of this act, shall, until duly recorded or lodged for record in the clerk's office, be void and of no effect against subsequent judgment cred-

itors without notice, and against all subsequent *bona fide* purchasers and mortgagees for valuable consideration, not having notice thereof, whose deed or mortgage shall have been first duly recorded; *provided*, that such deeds or instruments shall be valid and operative, although not recorded, except as against such subsequent judgment creditors, purchasers and mortgagees." Laws 1898, p. 690, § 54.

Sec. 774. North Carolina. (See Vol. II, § 594; Vol. III, § 644; Vol. IV, § 722; Vol. V, § 755.) Since the enactment of Laws 1885, ch. 147, no notice to a subsequent purchaser or mortgagee, however full and formal, will supply the want of registration of a prior conveyance. *Patterson* v. *Mills*, 121 N. C. 258 (28 S. E. Rep. 368).

Sec. 775. Ohio. (See Vol. II, § 596.) Until a deed is filed for record it is ineffectual to convey the property as against a subsequent *bona fide* purchaser, who at the time of his purchase had no knowledge of the existence of such deed. A judgment creditor who purchases at a sale made under his judgment which is a lien upon the land of the owner, is protected by the statute, where he has no notice of an outstanding, unrecorded conveyance. *Sternberger* v. *Ragland*, 57 O. St. 148 (48 N. E. Rep. 811).

Sec. 776. Oklahoma. (See Vol. II, § 597; Vol. V, § 757.) The holder of a judgment has priority over a previous unrecorded conveyance regardless of whether he had actual notice of such conveyance or not. *Lewis* v. *Atherton*, 5 Okla. 90 (47 Pac. Rep. 1070.) See opinion for review of authorities.

Sec. 777. Oregon. (See Vol. II, § 598.) Under Hill's Ann. Laws, § 271, a conveyance of real property or any interest therein is void against the lien of a judgment unless such conveyance be recorded at the time of docketing such judgment, or unless it be recorded within the time after its execution provided by law as between conveyances for the same real property. *Laurent* v. *Lanning*, 32 Or. 11 (51 Pac. Rep. 80).

Sec. 778. South Dakota. "Every conveyance of real property other than a lease for a term not exceeding one year, is void as against any subsequent purchaser or incumbrancer, including an assignee of a mortgage, lease or other conditional estate, of the same property, or any part thereof, in good faith and for a valuable consideration, whose conveyance is first duly recorded." Comp. Laws, § 8293. *Parrish* v. *Mahany*, 10 S. Dak. 276 (73 N. W. Rep. 97; 66 Am. St. Rep. 715).

Sec. 779. Texas. (See Vol. II, § 604.) The statute applies to a sheriff's deed. *Wiggins* v. *Sprague*, 15 Tex. Civ. App. 590 (40 S. W. Rep. 1019).

Sec. 780. Utah. (See Vol. II, § 605.) Construing § 2645 which provides that "the term 'conveyance,' as used in this act, shall be

construed to embrace every instrument in writing by which any real estate or interest in real estate is created, alienated or mortgaged, or assigned, except wills and leases, for a term not exceeding one year," in connection with § 2613, it is held that the assignee of a mortgage is required to have the assignment recorded in order to give notice to subsequent grantees, mortgagees and lienholders. *Donaldson* v. *Grant*, 15 Utah 231 (49 Pac. Rep. 779).

Sec. 781. Virginia. (See Vol. II, § 607; Vol. III, § 647.) One purchasing from a trustee in a trust deed executed by a judgment debtor's grantee, whose conveyance was not recorded until after the docketing of the judgment, takes subject to such judgment, although his conveyance and the trust deed were recorded before the docketing of the judgment. *Jones* v. *Byrne's Ex'x*, 94 Va. 751 (27 S. E. Rep. 591).

Sec. 782. Wisconsin. (See Vol. II, § 610; Vol. III, § 648; Vol. V, § 759.) A mere executory contract for the sale or purchase of land is not a "conveyance" and the vendee in such a contract is not a "purchaser" within the meaning of the statute. *First Nat. Bank* v. *Chafee*, 98 Wis. 42 (73 N. W. Rep. 318). A subsequent judgment creditor is not a *bona fide* purchaser within the meaning of the statute. *Stanhilber* v. *Graves*, 97 Wis. 515 (73 N. W. Rep. 48). One claiming a mechanic's lien which attaches after the execution of a mortgage, but before its recording, is not a purchaser for value under the statutes so as to have priority over the mortgage. *Mathwig* v. *Mann*, 96 Wis. 213 (71 N. W. Rep. 105; 65 Am. St. Rep. 47).

REDEMPTION.

FLANDERS v. AUMACK.

(32 Or. 19.)

Redemption by subsequent grantee of judgment debtor—Reinstatement of judgment lien and resale. Where land sold under an execution sells for less than the amount of the judgment, a redemption by a subsequent grantee of the judgment debtor reinstates the lien of the judgment and the property may be resold.

Sec. 783. Facts stated. On September 24, 1894, W. G. Jenne and wife were the owners of three certain tracts of real property situated in Multnomah county, Oregon; and upon that day one E. S. Rash recovered judgment against them in the circuit court for said county, which was duly

docketed. On November 26, 1894, Rash bid in the property, at execution sale, for less than the amount due on his judgment. On April 22, 1895, Jenne and wife conveyed said property to plaintiff, who subsequently redeemed it from the sale. Later an alias execution was issued upon said judgment for the balance due thereon, by virtue of which the sheriff levied upon the same property; and this suit is to enjoin the defendant, who is the administrator of the estate of E. S. Rash, deceased, and the sheriff from proceeding further with the execution. The decree was for plaintiff, the defendants appeal.

WOLVERTON, J.

Sec. 784. Statement of the case. The issues presented by the record involve a question as to the effect to be given the execution sale and redemption therefrom by the successor in interest of the judgment debtors. Plaintiff contends that it extinguished absolutely and effectually the lien of the judgment upon the premises in question, while the defendants insist that the redemption had the effect to reinstate the lien, and subject the property to a second sale for the unpaid balance of the judgment after the application thereto of the amount bid at the first sale. The identical question has been decided in *Settlemire* v. *Newsome*, 10 Or. 446, adversely to plaintiff's contention, but it is thought that decision was overruled in *Willis* v. *Miller*, 28 Or. 352 (31 Pac. Rep. 827); and it is strongly insisted that, if the latter does not suffice for that purpose, it should now be overruled, as unsound in principle and unsupported by the great weight of authority.

Sec. 785. Redemption by judgment debtor—Reinstatement of judgment lien and resale—Authorities collated and reviewed. The authorities are practically uniform that a redemption by the judgment debtor of his lands sold under execution will reinstate the lien of the judgment for any balance remaining unpaid, and subject the lands to a resale to satisfy such balance. *State* v. *Sherill*, 34 Ind. 57; *Allen* v. *McGaughey*, 31 Ark. 258, 260; *Bodine* v. *Moore*, 18 N. Y. 347; *Wood* v. *Colvin*, 5 Hill 228. Such was and is the doctrine in Iowa, and it was early held that the same result would

attend a redemption by his successor in interest. See *Crosby* v. *Eckader Lodge*, 16 Iowa 399; *Hays* v. *Thode*, 18 Iowa 51; Ror. Jud. Sales, §§ 955–959. But in *Clayton* v. *Ellis*, 50 Iowa 590, a more recent case from that state, Seevers, J., says: "If redemption of the whole or any parcel is made by the debtor, the judgment, to the extent of the balance due thereon, would constitute a lien on the premises in his hands, and they might again be sold on execution based on said judgment. But we see no reason why the debtor may not sell his right of redemption, and his vendee redeem by paying the amount of the bid, interest and costs." This result, it was thought, followed from the conclusion reached in that and prior cases (*Hays* v. *Thode*, 18 Iowa 51, and *Dewey* v. *Tuttle*, 44 Iowa 306), to the effect that the lien of a judgment under which real property has been sold and bid in by the judgment creditor, for less than the amount due thereon is devested as to the unpaid balance; but the only question presented in that case was whether land sold under execution in pursuance of a decree of foreclosure of a mortgage, and purchased by the execution creditor for less than the amount of the decree, could be redeemed by the holder of the deficiency judgment, who was an heir of the purchaser; and it was held that it could not, and this upon the ground that his lien was extinguished by the sale. What was said beyond this was not necessary to a decision of the case. However, whether it be regarded as *dicta* or not, it has come to be regarded as settled law in that state. The decision has been approved in *Hayden* v. *Smith*, 58 Iowa 285 (12 N. W. Rep. 289), and *Todd* v. *Davey*, 60 Iowa 534 (15 N. W. Rep. 421), and in *Moody* v. *Funk*, 82 Iowa 1, 3 (47 N. W. Rep. 1009; 31 Am. St. Rep. 455); Robinson, J., says: "That the lien of the judgment would not be devested 'as to all persons' by the sale was held, in effect, in *Harms* v. *Palmer*, 78 Iowa 446 (35 N. W. Rep. 515; 5 Am. St. Rep. 691); *Campbell* v. *Maginnis*, 70 Iowa 589 (31 N. W. Rep. 946); *Peckenbaugh* v. *Cook*, 61 Iowa 478 (16 N. W. Rep. 530), and other cases; for it was said in the cases cited that, if the judgment debtor redeem, the land redeemed would become subject to the lien of the unpaid portion of the judgment. But there is a marked difference between the case of a redemption by the judgment debtor and

that of a redemption by his grantee. * * * If his grantee redeem, the execution creditor has no right to complain." The earlier cases in that state may therefore be considered as overruled and no longer controlling. Mr. Freeman is of the opinion that the lien is removed by the sale, and that, while it may attach after redemption as to newly-acquired property for any deficiency, it is not restored as of its original date. 2 Freem. Ex'n, § 321. In *Seligmen* v. *Laubheimer*, 58 Ill. 124, it is held that, under the Illinois statute a redemption by the grantee of the mortgagor, who was also a junior mortgage creditor, from a sale under a decree in a suit instituted by the prior mortgagee, foreclosing both mortgages, made for less than the amount of the senior mortgage, did not restore the lien of such mortgage for the unpaid balance, but that the redemptioner took it devested from any lien arising therefrom. These latter may be classed as in support of respondent's contention, but *Simpson* v. *Castle*, 52 Cal. 644, does not aid him as it was rendered in view of a very different statute. Other authorities maintain the contrary doctrine. In *Titus* v. *Lewis*, 8 Barb. 70, one Graves recovered a judgment against James Whitcomb. Execution was issued and the lands of Whitcomb sold, and bid in by Titus for less than the judgment. Subsequently, James Whitcomb conveyed to Ansen Whitcomb, who redeemed from the sale by paying the amount of the bid and costs. Thereupon a resale of the same premises was had to satisfy the unpaid balance of the judgment, and the title under this latter sale was upheld. Under a statute which provides that, "upon such payment being made by any person so entitled to redeem any real estate so sold, the sale of the premises so redeemed, and the certificates of such sale, shall be null and void." Gridley, J., speaking for the court, says: "In this case, therefore, by the very terms of this enactment, the redemption under the first sale rendered that sale null and void; and, by necessary consequence, there having been no sale in law, there was no extinguishment of the judgment lien upon the premises. The judgment was merely paid and satisfied *pro tanto*, but remained a valid lien for the unpaid balance." *Wood* v. *Colvin*, 5 Hill 228, is cited and is regarded as an authority in point, although in that case the redemption was made by the judgment debtor. In

Rutherford v. *Newman*, 8 Minn. 47 (82 Am. Dec. 122), it is held that a redemption by the successor in interest of the judgment debtor terminates the sale, and applies the proceeds as a *pro tanto* payment on the judgment, leaving the estate in the hands of such redemptioner in the same condition in which it would have been had the redemption been made by the judgment debtor himself. *Warren* v. *Fish*, 7 Minn. 432 (Gil. 347), and *Standish* v. *Vosberg*, 27 Minn. 175 (6 N. W. Rep. 489), are to the same effect. In Indiana it is held that a redemption by one having a conveyance from the judgment debtor of real estate previously sold at sheriff's sale annuls the sale, and restores the property to the position it occupied before the sale with the judgment lien or liens reinstated for any sums remaining unpaid. *Cauthorn* v. *Indianapolis, etc., Railroad Co.*, 58 Ind. 214. And in *Green* v. *Stobo*, 118 Ind. 332 (20 N. E. Rep. 850), a like conclusion was reached, where an heir to the judgment debtor redeemed. See, also, *Hervey* v. *Krost*, 116 Ind. 268 (19 N. E. Rep. 125), and *Goddard* v. *Renner*, 57 Ind. 532. The case of *Porter* v. *Steel Co.*, 122 U. S. 267 (7 Sup. Ct. Rep. 1206), is in harmony with the doctrine of the Indiana courts.

Sec. 786. Redemption by subsequent grantee of the judgment debtor—Reinstatement of judgment lien and resale. Upon principle, it is difficult to see wherein the rights of a successor in interest redeeming are to be distinguished from those of the judgment debtor himself. The statute gives the right of redemption to the judgment debtor or successor in interest, but declares that, when the judgment debtor shall redeem, the effect of the sale shall terminate, and he shall be restored to his estate. A conveyance by the debtor can confer no greater rights than he himself had. It can not disencumber the property, nor give a better or superior title. The successor is not a *bona fide* purchaser for value, but simply occupies the shoes of his predecessor, with no new or enlarged rights or privileges, and can neither exercise nor enjoy any that the judgment debtor did not possess or could not have enjoyed. The effect of a sale under execution is to suspend, but not to devest the lien of the judgment, as it suspends all subsequent liens until redemption is made, but a sheriff's deed

cuts them off altogether. During the interim between the sale and the deed, the rights of the parties interested are measured by the statute. The sale is inchoate, and does not transfer title until consummated by the execution and delivery of the deed in due course of law. If subsequent lienors, whether by judgment, decree or mortgage, redeem, the course of the sale is not thereby impeded or precluded, but finally culminates in a deed as if no redemption was had by any one, and the deed puts an end to the lien of the judgment or decree under which the sale was made, and all other liens subsequently acquired. But a redemption by the judgment debtor has a very different effect. It terminates the sale and restores the estate. The sheriff's duties are at an end and he can proceed no further. And such is the effect of a redemption by his successor in interest. The statute has provided for redemption by but two classes of persons,—the judgment debtor and his successor in interest, and creditors having liens, etc. A redemption by the latter class is with a purpose of securing a sheriff's deed in pursuance of the sale, and a redemption by the former is inimical to the sale, and puts an end to it; and the effect can not be different whether the judgment debtor or his successor in interest redeem. The lien of the judgment under which the sale proceeded, if only partially satisfied, is not devested or eradicated, but is simply suspended, as are the liens of all creditors having subsequent judgments, decrees or mortgages pending the sale. If the sale is perfected either to the purchaser or through the redemption by subsequent lienors, they are all swept away; but if redemption is had by the judgment debtor or his successor, they all survive or are reinstated as though no sale had been had. This must be said of the subsequent liens, and it should be true of the lien of the judgment under which the sale was effected; else if it only took effect as of the date of redemption, subsequent liens would become superior and entitled to prior payment upon a resale. Mr. Justice Blatchford, when he rendered the opinion in *Porter* v. *Steel Co.*, 122 U. S. 267 (7 Sup. Ct. Rep. 1206), evidently entertained a like view, for he says: "The redemption was not made by the judgment debtor, so as to vacate the sale and reinstate the lien for the balance of the judgment which the purchase money of the sale did not pay." So with Mitchell, J., in *Hervey* v.

Krost, 116 Ind. 268 (19 N. E. Rep. 125). He says: "An examination of the statute will make it apparent that the right to make a statutory redemption is confined to three classes of persons: (1) The owner or part owner, his executor or administrator, under the order of the court, or his heirs of devisees, or any person claiming a legal or equitable title under him or them; (2) any judgment creditor; * * * and (3) any person having a lien, otherwise than by judgment. * *

* It is only in case of redemption by persons embraced in the first class, that the sale is vacated, and the real estate again subjected to the lien of the judgment, and to resale as if no sale had been made." For additional authorities bearing more or less upon the views here entertained, see 20 Am. & Eng. Enc. Law, (1st Ed) 639; *Bodine* v. *Moore*, 18 N. Y. 347; *Livingstone* v. *Arnoux*, 56 N. Y. 507; *Phyfe* v. *Riley*, 15 Wend. 248 (30 Am. Dec. 55); *Catlin* v. *Jackson*, 8 Johns. 520; *Cartwright* v. *Savage*, 5 Or. 397; *Dray* v. *Dray*, 21 Or. 59, 67 (27 Pac. Rep. 228). These latter authorities leads to the conclusion that a redemption by the grantee of the judgment debtor from an execution sale of real property, bid in for less than the judgment, applies the amount bid *pro tanto* in payment of such judgment, terminates the sale, restores him to his estate, and restores or reinstates the lien for the unpaid balance, and a resale of the property may be had to satisfy the same. This we think to be the better rule and doctrine, and therefore approve *Settlemire* v. *Newsome*, 10 Or. 446. Nor does *Willis* v. *Miller*, 23 Or. 352 (31 Pac. Rep. 827), contravene the rule, and was not designed nor intended to overrule *Settlemire* v. *Newsome*, or modify it in any particular. The facts in *Willis* v. *Miller* were that one Phipps, being the owner of certain real property, mortgaged it to Humphrey & Flint, and two days later conveyed it to Willis. Humphrey & Flint subsequently obtained a decree of foreclosure directing a sale of the premises to satisfy the same, with judgment over against Phipps for any deficiency that might remain after the sale and application of the proceeds. A sale was had in pursuance of the decree and a deficiency remained. Willis redeemed, and, an execution having been issued upon the deficiency judgment, and a levy made by virtue thereof, upon the same premises, a resale was enjoined. The deficiency

judgment was against Phipps alone, and therefore never became a general lien against the land in the hands of Willis. Hence it was held that the redemption by Willis did not affect the judgment in any way, and that, by the sale under the decree, the mortgagees had exhausted the remedy afforded them by virtue of their mortgage contract.

Sec. 787. Same—Application of principles to sale on mortgage foreclosure. A mortgage is a specific lien, which attaches by virtue of the contract of the parties concerned; but the lien of a judgment is general, and attaches by operation of law, as a sequence of its rendition. Foreclosure is a remedy by which the property covered by the mortgage may be subjected to sale for the payment of the demand for which the mortgage stands as security, and, when the decree is had, and the property sold to satisfy it, the mortgagee has obtained all he contracted for; but, if there is also a personal decree against the mortgage debtor, this becomes, from the date of its docketing, a general lien upon his real property, as in case of a judgment; and if a deficiency remain after the application of the proceeds of the sale of the lands covered by the mortgage, the decree may be enforced by execution as in ordinary cases. Hill's Ann. Laws (Or.), § 417, subd. 2. The resale does not take place under the order for the sale of the specific property covered by the mortgage lien, for that has been exhausted, but under the personal decree which remains as a deficiency decree against the mortgage debtor after the application of the proceeds arising under the order of sale; and a redemption will not reinstate the specific mortgage lien, while it will the general lien acquired by the personal decree. This distinction is clear, and is bottomed both upon principle and authority. The redemption is from the sale, and not from the mortgage; and if the lien of the personal decree has never attached, by reason of the mortgagor not having the fee of the property at the time it was rendered there never existed any lien to be reinstated against his successor in interest, who purchased prior to the decree. *Ogle* v. *Kærner*, 140 Ill. 170 (29 N. E. Rep. 563), fully sustains this view. For authorities other than those cited in the opinion, see, *Standish* v. *Vosberg*, 27 Minn. 175 (6 N. W.

Rep. 489); *Fowler* v. *Johnson*, 26 Minn. 388 (8 N. W. Rep. 986; 6 N.W. Rep. 486); *Campbell* v. *Maginnis*, 70 Iowa 589 (31 N. W. Rep. 946); *Harms* v. *Palmer*, 61 Iowa 483 (16 N. W. Rep. 551); *Harms* v. *Palmer*, 73 Iowa 446 (5 Am. St. Rep. 691; 35 N. W. Rep. 515); *Escher* v. *Simmons*, 54 Iowa 269, 275 (6 N. W. Rep. 274). The decree of the court below will be reversed, and one entered here dismissing the complaint. Reversed.

Note. The opinion reported above so exhaustively collates the authorities as to render further annotation unnecessary. Even in Iowa, where upon the precise question presented by this case a contrary doctrine seems to be adhered to, it is held that where an insolvent execution defendant conveyed lands previously sold on execution, to his wife without any consideration and she afterward made the redemption in her own name with his money, the original execution creditor who bid in the property for less than the amount of his judgment could have the deed set aside and subject the lands to the payment of the balance due on his judgment. *Peckenbaugh* v. *Cook*, 61 Iowa 478 (16 N. W. Rep. 530).

EPITOME OF CASES.

Sec. 788. Redemption by judgment creditor. A judgment creditor's right to redeem cannot be affected by any agreement made between other parties. *Swanson* v. *Realization & Debenture Corp.*, 70 Minn. 380 (73 N.W. Rep. 165). Construing the redemption statutes of Indiana (Ind. Rev. Stat. 1894, §§ 782–785) it is held that the holder of a junior unforeclosed mortgage, who silently permits a judgment creditor whose lien is not only junior to the oldest mortgage but junior also to his own, to redeem from the sale on the oldest mortgage which is the oldest lien, cannot treat the foreclosure sale as having been vacated for his benefit by such redemption and then foreclose his mortgage, so as to cut out the redemptioner unless the land is sufficient to pay both liens. *Warford* v. *Sullivan*, 147 Ind. 14 (46 N. E. Rep. 27). See opinion for extensive review of redemption statutes of Indiana. In Iowa it is held that a junior judgment creditor has no right to redeem after the expiration of ten years from the rendition of his judgment. *Hansen's Empire Fur Factory* v. *Teabout*, 104 Ia. 360 (73 N. W. Rep. 875). Minn.

Rev. Stat. 1894, §§ 5481, 6044, construed and applied—validity, force and effect of redemption by an assignee of a judgment under an unrecorded assignment. *Swanson* v. *Realization & Debenture Corp.*, 70 Minn. 380 (73 N.W. Rep. 165). Mill. & V. Tenn. Code, §§ 2950, 2952 (Shannon's Code, §§ 3814, 3816), construed and applied—redemption by purchasing creditor—right to advance bid. *Rogers* v. *Tindell*, 99 Tenn. 356 (42 S. W. Rep. 86). Mills' Ann. Colo. Stat. § 2548, construed and applied—prior redemption rights of general judgment creditors—constitutionalty of statute. *Paddack* v. *Staley*, 24 Colo. 188 (49 Pac. Rep. 281).

Sec. 789. Redemption by life tenant. One having a life estate in a portion of mortgaged premises cannot redeem except by paying the entire mortgage debt, unless the mortgagee consents to a redemption by payment of the life estate's proportionate share. If redemption is made by the payment of the whole debt, the life tenant is entitled to possession of the whole of the estate until the amount he has been obliged to pay over and above his proportional share has been repaid him by the rents and profits of the estate; and upon redemption by the payment of his proportionate share, he is entitled to possession of the portion of the estate in which the life tenancy exists, free from incumbrance of the mortgage. *Kerse* v. *Miller*, 169 Mass. 44 (47 N. E. Rep. 504).

Sec. 790. Redemption from mortgage foreclosure—Rights of junior mortgagee. A widow, in possession of land, pending assignment of her dower therein, may redeem it from a mortgage executed by her husband before their marriage. *Merselis* v. *Van Riper*, 55 N. J. Eq. 618 (38 Atl. Rep. 196). A mortgagor's right to redeem will be favored and in order to preserve it, a conveyance by the mortgagee to the purchaser of the equity of redemption at a foreclosure sale, will be construed to be an assignment of the mortgage. *Felker* v. *Mowry*, N. H. (38 Atl. Rep. 726). A mortgagor is not estopped to assert his right to redeem, by his agreement with a purchaser of the land to surrender possession before the expiration of the period given for redemption, both parties being ignorant of his right to redeem. *Wood* v. *Hol-*

land, 64 Ark. 104 (40 S. W. Rep. 704). The holder of a judgment lien is not relieved from redeeming from a foreclosure sale had under a prior purchase money mortgage, because the mortgagee had by agreement with the mortgagor permitted him to give another mortgage for a specified sum which should have priority over the purchase money mortgage. *Peaslee* v. *Hart*, 71 Minn. 319 (73 N. W. Rep. 976). Redemption may be made, under Starr & C. Ann. Ill. Stat., Vol. 2, p. 1395, from a resale of property ordered after a sale under a decree of foreclosure has been set aside. *Bruschke* v. *Wright*, 166 Ill. 183 (46 N. E. Rep. 813; 57 Am. St. Rep. 125). Where, after the execution of a mortgage containing a power of sale, the mortgagor becomes insane and remains so until after the foreclosure of the mortgage and sale under the power, and until the time for redemption has expired, he may maintain a bill in equity to be permitted to redeem from such sale, where the mortgagee making the sale and the purchaser thereat have dealt with him in bad faith. *Lundberg* v. *Davidson*, 68 Minn. 328 (71 N. W. Rep. 395). Where one in good faith takes a deed from one whom he supposes has the right to convey the equity of redemption, redeems from a foreclosure sale, by payment to the purchaser of the amount to which he is entitled, and subsequently it is determined that the deed of the equity of redemption is void, it is held that under such circumstances equity will hold the "redemption" either as having the effect of annuling the sale or an assignment of the interest of the purchaser at such sale, according as the one or the other will be most equitable and most for the interest of the party making the so-called redemption. *Knight* v. *Schwandt*, 67 Minn. 71 (69 N. W. Rep. 626). Construing and applying a statute (Gav. & H. Ind. Stat., Vol. 2, p. 251) giving right of redemption to the owner, mortgagee, or judgment creditors having a lien upon the property and providing that when any mortgagee or judgment creditor shall redeem, they shall retain a lien on the premises against the owner or any junior incumbrancer, it is held that where a purchaser at a foreclosure sale made under a mortgage in which the mortgagor's wife did not join, subsequently redeems from a sale made under a senior mortgage in which the mortgagor's wife joined, the latter redemption passed to him

the lien of the prior mortgage so as to prevent the mortgagor's wife from subsequently asserting an inchoate interest in the land. *Breedlove* v. *Austin*, 146 Ind. 694 (46 N. E. Rep. 25). Minn. Gen. Stat. 1894, § 6041, construed and applied—redemption from a mortgage foreclosure—rate of interest to be paid. *Evans* v. *Rhode Island Hospital T. Co.*, 67 Minn. 160 (69 N. W. Rep. 715).

A second mortgagee, who takes an assignment of the certificate of a foreclosure sale, made under a prior mortgage, within six months after such sale, has all the rights of a second mortgagee redeeming under McClain's Ia. Code, § 4331. *Stephens* v. *Mitchell*, 103 Ia. 65 (72 N. W. Rep. 434). A junior mortgagee's right to redeem from a foreclosure sale, had under a prior mechanic's lien, is not foreclosed by such action where he is not made a party to it; and he does not lose his right to redeem from such sale because he subsequently obtains a decree for the sale of the premises under his mortgage, without being first required to redeem from the prior lien. S. Dak. Comp. Laws, §§ 4338, 4339, construed and applied. *American Banking & Trust Co.* v. *Lynch*, 10 S. Dak. 410 (73 N. W. Rep. 908). Where a senior mortgage has been foreclosed without making a junior mortgagee a party and the property sold under the decree has been acquired and improved in good faith by a subsequent owner whom the junior mortgagee notifies of his claim as soon as he has notice of such improvement, such junior mortgagee may redeem by paying the amount of the debt secured by the prior mortgage, interest and taxes, together with the value of the improvements made by such owner before giving of the notice. But he will not be required to pay for improvements made after the giving of the notice. *Ensign* v. *Batterson*, 68 Conn. 298 (36 Atl. Rep. 51). Where a second mortgagee brings an action to redeem from a fraudulent foreclosure by a prior mortgagee under which the prior mortgagee purchased the premises, the latter cannot claim the right to treat his possession as that of the owner of the equity of redemption, because such owner has made no attempt to avoid the sale, but such prior mortgagee must account as a mortgagee in possession, and he is chargeable with such rental of the premises as he could have realized by reasonable diligence.

The second mortgagee has a right to an accounting upon the same principles as the owner of the equity of redemption. *Long* v. *Richards*, 170 Mass. 120 (48 N. E. Rep. 1088; 64 Am. St. Rep. 281).

Sec. 791. Agreements concerning redemption—Extension of time. An agreement by a purchaser at a judicial sale to allow the owner to redeem, is binding on a subsequent purchaser who acquires title with notice of the agreement. *Sebree* v. *Green*, Ky. (41 S. W. Rep. 290). An action by a landowner to procure the benefit of a contract between him and a purchaser of his property at foreclosure sale extending the time given for redemption which has been violated by the latter, may be treated as a bill to redeem, and it is not necessary for the plaintiff to allege a formal offer of performance on his part before filing the bill. Where relief is granted in such a case at least ninety days' time should be given in which to make the redemption. *Taylor* v. *Dillenberg*, 168 Ill. 235 (48 N. E. Rep. 41).

Sec. 792. Procedure to effect redemption. One seeking to exercise a statutory right to redeem must comply with the terms of the statute. *State* v. *O' Conner*, 6 N. Dak. 285 (69 N. W. Rep. 692). In an equitable action by a mortgagor to redeem from a foreclosure of his mortgage, it is not necessary for him to show a tender, where he alleges a willingness to pay whatever may be found due on the mortgage debt. *Jopling* v. *Walton*, 138 Mo. 485 (40 S. W. Rep. 99). Citing, *Dwen* v. *Blake*, 44 Ill. 135. Where the right of redemption is denied one seeking to exercise it, he need not bring the redemption money into court and make an actual tender. *Rogers* v. *Tindell*, 99 Tenn. 356 (42 S. W. Rep. 86). In Alabama it is held that when a mortgagor or other person entitled to the statutory redemption applies to a court of equity to enforce this right, he must make payment of the money into court with the bill and offer to abide the decree of the court. *Murphree* v. *Summerlin*, 114 Ala. 54 (21 So. Rep. 470). Where one having a right to redeem has made the proper statutory tender, he may sue in a court of equity to enforce his right of redemption. *Vick* v. *Beverly*, 112 Ala.

458 (21 So. Rep. 825). One who has taken a conveyance from a purchaser at an execution sale is entitled to receive the sums due upon redemption. *Cosgrove* v. *Merz*, R. I. (37 Atl. Rep. 704). Where a mortgage has been foreclosed by publication, one who is entitled to redeem must, before he can do so, pay the necessary expenses of such foreclosure, but this does not include attorney's fees. *Whitcomb* v. *Harris*, 90 Me. 206 (38 Atl. Rep. 138). Mass. Pub. Stat., ch. 181, § 23, construed and applied—redemption from mortgagee—repayment of taxes paid by him. *Kerse* v. *Miller*, 169 Mass. 44 (47 N. E. Rep. 504). It is held that one who has expended money in improvements and repairs of the premises necessary for their preservation, is entitled to be reimbursed upon redemption. *Cosgrove* v. *Merz*, R. I. (37 Atl. Rep. 704).

Sec. 793. Miscellaneous notes—Statutes construed. Where one to whom a failing debtor conveys in trust land previously sold under execution, buys the purchaser's rights under his bid, the transaction will be treated as a redemption by the trustee. *Bradford* v. *Clayton*, Ky. (39 S. W. Rep. 40). A subsequent incumbrancer who redeems from a judgment for the strict foreclosure of a mechanic's lien, cannot claim the benefit of special remedies given to the holder of such judgment in case no redemption shall be made, although in addition to this redemption he acquires a quitclaim deed from the judgment plaintiff. *Throckmorton* v. *Shelton*, 68 Conn. 413 (36 Atl. Rep. 805). Applying Ala. Code 1886, § 1879, it is held that levying upon and selling land as the property of a judgment debtor conclusively establishes, as against the purchaser, that such debtor has a redeemable interest in the land. *Henderson* v. *Prestwood*, 115 Ala. 464 (22 So. Rep. 15). A statute (Cal. Stat. 1895, p. 225) decreasing the rate of interest to be paid upon redemption, is unconstitutional as to sales made before its passage. *Thresher* v. *Atchison*, 117 Cal. 73 (48 Pac. Rep. 1020; 59 Am. St. Rep. 159). Mo. Rev. Stat. 1889, § 7079, construed and applied—right of grantor in trust deed to redeem when property is purchased by the beneficiary or for him. *Keith* v. *Browning*, 139 Mo. 190 (40 S. W. Rep. 764). Construing the redemp-

tion statute of North Dakota (Rev. Codes, §§ 5540–5544), it is held that a redemptioner must redeem from another redemptioner on sale of real estate under execution or on foreclosure of a mortgage by advertisement within sixty days after the last preceding redemption, although the year is not yet expired since the day of sale. *State* v *O' Connor*, 6 N. Dak. 285 (69 N. W. Rep. 692).

Sec. 794. Statutes amended and new statutes. A recent statute in Arkansas provides that a mortgagor, his heirs or legal representatives may redeem from a foreclosure sale, "at any time within one year from the date of the sale, by the payment of the amount for which the property was sold, together with interest thereon, at the rate borne by the decree or judgment, and the costs of foreclosure and sale." The mortgagor may waive this right in his mortgage or deed of trust, and the statute does not apply to existing contracts or pending suits. Laws 1899, p. 279. Ida. Laws 1899, p. 241, amending Rev. Stat., §§ 4492, 4498, extends the time of redemption of real estate sold under execution or foreclosure. Minn. Gen. Stat. 1894, § 6041—redemption from foreclosure sale by advertisement—amended, Laws 1899, p. 84. In New Hampshire real estate may be sold on execution, subject to redemption. Laws 1899, p. 314.

REFORMATION.

EPITOME OF CASES.

Sec. 795. As to when equity will reform instruments. A purchaser at an execution sale cannot reform the title papers of the execution defendant. *Burrows* v. *Parker*, 31 Or. 57 (48 Pac. Rep. 1100; 65 Am. St. Rep. 812). In all cases of mistakes in written instruments, courts of equity will interfere only as between the original parties or those claiming under them in privity, such as personal representatives, heirs, devisees, legatees, asignees, voluntary grantees, or judgment creditors, or purchasers from them with notice of the facts. *Adams* v. *Baker*, Nev. (51 Pac. Rep. 252).

An illiterate party to a contract, who is mistaken as to its contents and legal effect, may have it reformed where his erroneous conclusions are the result of the fraudulent conduct of the other party to the contract who had knowledge of such erroneous conclusions. *Williams* v. *Hamilton*, 104 Ia. 423 (73 N. W. Rep. 1029; 65 Am. St. Rep. 475). Where the owner of several adjoining lots, the rear of which had no connection with any passageway, formed the plan in selling them of reserving an alleyway three feet wide across the rear of each lot, which reservation was explicitly made in some of the deeds, referred to in others and all the purchasers had notice of it, deeds conveying the lots may be reformed so as to express the reservation and grant of such right of way in explicit terms. *Haslett* v. *Stephany*, 55 N. J. Eq. 68 (36 Atl. Rep. 498). Where an instrument which requires a seal is by accident or mistake executed without one, a court of equity may grant relief by compelling a seal to be affixed or otherwise. *Gaylord* v. *Pelland*, 169 Mass. 356 (47 N. E. Rep. 1019). Citing, *Bernard's Tp.* v. *Stebbins*, 109 U. S. 341, 349 (3 Sup. Ct. Rep. 252); *Bullock* v. *Whipp*, 15 R. I. 195 (2 Atl. Rep. 309); *Conover's Adm'r* v. *Brown's Ex'rs*, 49 N. J. Eq. 156 (23 Atl. Rep. 507); *Lebanan Sav. Bank* v. *Hollenback*, 29 Minn. 322 (13 N. W. Rep. 145); *Springfield Five Cents Sav. Bank* v. *South Congregational Soc. of Springfield*, 127 Mass. 516; *Chase* v. *Peck*, 21 N. Y. 581. Acts of ratification will not bar a party's right to have a contract reformed unless committed with a knowledge and understanding of the contents of the contract. *Williams* v. *Hamilton*, 104 Ia. 423 (73 N. W. Rep. 1029; 65 Am. St. Rep. 475).

Sec. 796. Reformation of mutual mistakes. A mutual mistake as to a reservation in a deed between cotenants may be reformed. *Smith* v. *Wakeman*, 114 Mich. 611 (72 N. W. Rep. 599). A condition omitted from a deed by mutual mistake may be inserted. *Rice* v. *Hall*, Ky. (42 S. W. Rep. 99). A mutual mistake in a recorded written contract for the sale of real estate may be reformed as against an innocent assignee of the vendee for value, without notice of the mistake. *Klatt* v. *Dummert*, 70 Minn. 467 (73 N. W. Rep. 404). Where, upon the conveyance of a husband's lands, by

mutual mistake of the parties interested, the purchase money mortgage is taken in the name of the wife when it was the understanding and contract that it should be made to them jointly, he may have the instrument reformed. *Kropp* v. *Kropp*, 97 Wis. 137 (72 N. W. Rep. 381).

Sec. 797. Reformation of mistakes in description. Where land imperfectly described in a deed, having a meritorious consideration is susceptible of identification by outside evidence, the deed may be corrected in equity. *Hutsell* v. *Crewse*, 138 Mo. 1 (39 S. W. Rep. 449). In the reformation of a mutual mistake in the description of property conveyed by deed, a boundary line established by the parties by measurement will prevail over a location given such land by reference to platted lots referred to in such conveyance. *Henderson* v. *Beasley*, 137 Mo. 199 (38 S. W. Rep. 950). A description in a deed, otherwise regular, may be reformed where, on account of a mutual mistake of the parties, it includes more land than was intended should be conveyed. *Thompson* v. *Ladd*, 169 Ill. 78 (48 N. E. Rep. 174). A mutual mistake in the description of the premises in a mortgage or deed may be reformed, not only as against a party to the instrument but as against subsequent purchasers chargeable with notice of such mistake. *Perkins* v. *Canine*, 113 Mich. 72 (71 N. W. Rep. 457); *Carpenter Paper Co.* v. *Wilcox*, 50 Neb. 659 (70 N. W. Rep. 228). See opinion for particular evidence held sufficient to justify the reformation of a description in a mortgage. A description of land in a mortgage, although given by metes and bounds, may be reformed, where, on account of a mutual mistake, it does not include buildings which both parties intended to embrace in the mortgage, even as against the mortgagor's grantor claiming a reversion of the premises, where the mistake in the description originated in the deed which he gave which authorized the mortgaging of the premises and he participated in causing the mortgage to be made. *Jenkins* v. *Jenkins University*, 17 Wash. 160 (49 Pac. Rep. 247). Where the owner of land who executes and records a plat thereof, retains what he believes to be a copy of it, but which does not number the lots in the same manner as the recorded plat, and exe-

cutes conveyances to purchasers in accordance with such copy, who take possession of the land really intended to be conveyed, they may have the description in their deeds reformed so as to conform to the recorded plat, as against a subsequent vendee taking conveyances with the knowledge of the mistake in the description. *Ingals* v. *Merriman*, 96 Wis. 400 (71 N. W. Rep. 868).

Sec. 798. Practice in actions for reformation—Proof necessary. Where an action seeks to reform a trust deed so as to include omitted lands, the parties to it and parties to subsequent conveyances affecting such lands are all proper parties. *Horner* v. *Bramwell*, 23 Colo. 238 (47 Pac. Rep. 462). In an action to reform a deed executed to husband and wife, which on its face creates an estate by entireties, so as to create an estate in common, the original grantors and the grantees and devisees of the original grantees are necessary parties. *Thiefes* v. *Mason*, 55 N. J. Eq. 456 (36 Atl. Rep. 916). In a suit to reform a defective certificate of acknowledgment, applying Cal. Code Civ. Proc., § 580, which authorizes a court, when an answer to the complaint has been filed, to grant to the plaintiff "any relief consistent with the case made by the complaint and embraced within the issue," it is held that the court may correct defects in the certificate other than those specified in the complaint, where no objection has been made to the introduction of evidence thereof. *Poledori* v. *Newman*, 116 Cal. 375 (48 Pac. Rep. 325).

To justify the reformation of a conveyance or written contract for a mistake, the mistake must be mutual and be established by clear, convincing and satisfactory evidence; and the burden of proof is upon the party alleging the mistake. *Home Fire Ins. Co.* v *Wood*, 50 Neb. 381 (69 N. W. Rep. 941); *Moore* v. *Tate*, 114 Ala. 582 (21 So. Rep. 820); *Fanning* v. *Doan*, 139 Mo. 392 (41 S. W. Rep. 742). Particular evidence held sufficient to establish the right to have a deed reformed. *Hoyer* v. *King*, 101 Ia. 363 (70 N. W. Rep. 695). Particular evidence held insufficient. *Fanning* v. *Doan*, 139 Mo. 392 (41 S. W. Rep. 742). Particular evidence held insufficient to authorize the reformation of a written contract. *Moore* v. *Tate*, 114 Ala. 582 (21 So. Rep. 820).

RENTS.

EPITOME OF CASES.

Sec. 799. Creation of liability to pay rent. An owner of land may maintain an action for the use and occupation against one whose building encroaches thereon. *Beardsley* v. *Town of Nashville*, 64 Ark. 240 (41 S. W. Rep. 853). A provision in a deed of standing timber requiring the payment of rent by the grantee after the expiration of a certain time, upon his acceptance of the deed, becomes binding upon him although he did not sign the instrument. *Weaver* v. *Southern Oregon Co.*, 30 Or. 348 (48 Pac. Rep. 167). Where a father occupies lands which he has purchased and caused to be conveyed to his minor sons in such a manner as to operate as a present advancement, he will be held liable to account to them for the rents and profits of such land, although the statute (Sand. & H. Ark. Dig., § 3568) makes him their natural guardian. Bunn, C. J., dissenting. *Rhea* v. *Bagley*, 63 Ark. 374 (38 S. W. Rep. 1039; 36 L. R. A. 86). Ala. Code, § 2706, which provides that "persons holding possession under color of title in good faith are not responsible for damages or rent for more than one year before the commencement of the suit," is held not to apply to a mortgagee who has taken possession before foreclosure. *Keith* v. *McLaughlin*, 114 Ala. 60 (21 So. Rep. 483). One who enters into possession and occupies premises by the consent of the owner as the successor of his lessee and while so occupying pays rent at the rate stipulated in the lease during the term, and after the expiration of the term continues to so occupy and use the premises, he thereby becomes liable for the use and occupation of the premises, and the original lease is admissible to fix the amount of rent. *Weaver* v. *Southern Oregon Co.*, 30 Or. 348 (48 Pac. Rep. 167). A husband does not become liable to his wife for rent on account of their joint occupancy of her property for a home. *Trefethen* v. *Lynam*, 90 Me. 376 (38

Atl. Rep. 335; 60 Am. St. Rep. 271; 38 L. R. A. 190). A lessee who has assigned his interest in the lease to his cotenant, cannot, by subsequently paying the rent to the end of the term and taking an assignment of the lease to himself from the lessor, recover on the lease from his cotenant, or a tenant of his cotenant, the amount of rent so paid by him. *Holman* v. *De Lin-River-Finlay Co.*, 30 Or. 428 (47 Pac. Rep. 708).

Sec. 800. Pleadings and practice in actions for rent. An action can be maintained upon an absolute agreement to pay rent, where there is a demise, and the lessor is not in fault in preventing actual enjoyment, although the tenant has not taken possession of or used the demised premises. *Union Pac. Ry. Co.* v. *Chicago, R. I. & P. Ry. Co.*, 164 Ill. 88 (45 N. E. Rep. 488). The Statute of Marlbridge (52 Hen. III, ch. 4) adopted in South Carolina in 1712, by 2 Stat. at Large 418, which gave a tenant the right of action for unreasonable distress for rent, is no longer in force in that state, and the landlord may now distrain all the tenant's property on the premises. *Bender* v. *Ross*, 51 S. C. 217 (27 S. E. Rep. 627). Attorney's fees cannot be recovered by a lessor in an action for rent, under a provision in the lease providing for their payment, where the lessee recovers on a counterclaim an amount greater than the amount due. *Taylor* v. *Lehman*, 17 Ind. App. 585 (46 N. E. Rep. 84). Ala. Code, § 2715, applied—sufficiency of particular complaint discussed. *Burgess* v. *American Mortgage Co.*, 115 Ala. 468 (22 So. Rep. 282). S. C. Laws 1899, p. 81, gives a landlord the right to pay off prior mortgage liens on property otherwise subject to distress for rent, and subject the property to the payment of the same, as well as to the payment of amount due for rent.

Sec. 801. Proof required in actions for rent—Burden of proof. In an action for rent it is sufficient to show a contract with the plaintiff and a holding under him, his title or right of possession being immaterial. *Bartlett* v. *Robinson*, 52 Neb. 715 (72 N. W. Rep. 1058). Where a third party is in possession of leased premises under the lessee, the law presumes that the lease has been assigned by the lessee to such third party, and, in a suit against him for rent, the burden is

on him to explain the character of his possession; such a burden is also on his assignee in insolvency. This rule is not changed by the fact that the lease contains a condition of forfeiture in case of such an assignment by the lessee. *Dickinson Co.* v. *Fitterling*, 69 Minn. 162 (71 N. W. Rep. 1030). Where, in an action for rent against a tenant holding over, the plaintiff claims that the tenant is occupying under an express agreement for a new tenancy for a year, and the lessee claims that his tenancy is by the month, the burden of proof is on the plaintiff. *Mittwer* v. *Stremel*, 69 Minn. 19 (71 N. W. Rep. 698). In an action of assumpsit on a lease the execution of which is proved, a defendant who claims that his signature was procured by fraud, has the burden of proof as to that issue. *Bly* v. *Brady*, 113 Mich. 176 (71 N. W. Rep 521). As to the conclusiveness of a receipt for "payment in full" as a defense to an action for rent, see *Ramsdell* v. *Clark*, 20 Mont. 103 (49 Pac. Rep. 591). For particular fact cases considering questions of evidence and instructions, in actions for rent, see *Hirschfield* v. *Franks*, 112 Mich. 448 (70 N. W. Rep. 894); *Burgess* v. *American Mortg. Co.*, 115 Ala. 468 (22 So. Rep. 282).

Sec. 802. Defenses in action for rent. Applying W. Va. Code, ch. 126, § 4, in an action for breach of covenant to pay rent, it is held that the defendant must, in order to be able to show payment, plead the payment specially *Arnold* v. *Cole*, 42 W. Va. 663 (26 S. E. Rep. 312). A lessee who defends against an action for rent on the ground that the lessor did not furnish sufficient heat for the premises as agreed in his lease, has the burden of proof. *Gatch* v *Garretson*, 100 Ia. 252 (69 N. W. Rep. 550). It is no defense to an action for rent for the lessee to allege that he abandoned the premises on account of the failure of the water supply, where it appears that he inspected the premises and had full knowledge of the source of the supply of water before taking his lease which was not procured by any fraud on the part of the plaintiff. *Lewis* v. *Clark*, 86 Md. 327 (37 Atl. Rep. 1035). One who has taken possession and enjoyed the use, under a void lease, cannot defeat the payment of a note given for rent, on the ground of the invalidity of the lease

Cherokee Strip Live-Stock Ass'n v. *Cass Land & C. Co.*, 138 Mo. 894 (40 S. W. Rep. 107). To an action for rent upon a lease at will, it is no defense to show that defendant was prevented from terminating the lease by legal proceedings to which the plaintiff was not a party. *Bartlett* v. *Robinson*, 52 Neb. 715 (72 N.W. Rep. 1053). One who has accepted a lease and entered into possession, cannot defeat his lessor's action for rent by proof of a voluntary attornment to an adverse claimant of the premises whom the lessee alleges to be the true owner, it not being shown that he has been kept out of possession or evicted by the holder of the paramount title or that he had surrendered the lease. *Nissen* v. *Turner*, 50 Neb. 272 (69 N. W. Rep. 778); *Moser* v. *Cole*, 50 Neb. 636 (70 N. W. Rep. 275). Where the possession of a vendee's lessee has not been disturbed, he cannot defeat an action by the vendee to recover rent, by showing that such vendee was in default under his contract and that the vendor had the legal right to dispossess him by foreclosure or otherwise. *Nearing* v. *Coop*, 6 N. Dak. 345 (70 N. W. Rep. 1044). A party who is proceeded against in a state court by a receiver in a federal court for the payment of rents due may plead in compensation and extinguishment thereof a sum said receiver has previously collected in excess of what he was entitled to have received. *Grant* v. *Buckner*, 49 La. 668 (21 So. Rep. 580). Under Pa. Pub. Laws 1878, p. 205, in an action for ground rent against a grantee of real estate, it is a good defense for him to show that he has not, by agreement in writing or words in the deed of conveyance, assumed the personal liability for the rent. *Easby* v. *Easby*, 180 Pa. St. 429 (36 Atl. Rep. 923). Where a lessee pays rent monthly for several months without making any objection on account of the premises not being completed according to the terms of the lease, he waives any claim to a deduction on account of such noncompletion. *Murphy* v. *Marshall*, 179 Pa. St. 516 (36 Atl. Rep. 294). One who takes a lease of premises subject to a visible and permanent servitude or easement, is liable for the full rent although he was deprived of the benefit of a part of the premises for a portion of the time on account of repairs made by the owner of the easement. *Friend* v. *Oil Well Supply Co.*, 179 Pa. St. 290 (36 Atl. Rep. 219). Where

a contract of lease is entire, and is broken by the lessor in refusing to deliver possession of a portion of the premises described therein, said lessor is estopped from collecting any portion of the rent agreed upon after demand has been made upon him by the lessee for the possession of the remaining portion of said premises; and this, notwithstanding the latter may have retained the possession of a portion of said premises after such demand and refusal, unless complete performance of said contract has been waived by him. *Penny* v. *Fellner*, 6 Okla. 886 (50 Pac. Rep. 128).

Sec. 803. Counterclaims in actions for rent. There is no inconsistency between an admission in an answer that defendant is indebted for rent, and a counterclaim for repairs made by the defendant for which the plaintiff agreed to pay him. *Hausman* v. *Mulheran*, 68 Minn. 48 (70 N. W. Rep. 866). In an action for rent a lessee may recover by counterclaim damages resulting from a breach of an implied covenant for quiet enjoyment. *Hanley* v. *Banks*, 6 Okla. 79 (51 Pac. Rep. 664). In an action to recover his share of the rents brought by one tenant in common against his cotenant having the renting of the property in charge, the latter may maintain a counterclaim for damages against the plaintiff, where he has wrongfully driven off the tenants and thereby reduced the rental. *Dale* v. *Hall*, 64 Ark. 221 (41 S. W. Rep. 761)

Sec. 804. Miscellaneous notes. A mortgagee who purchases at a foreclosure sale had under his mortgage, becomes the owner of the premises and is not liable to account to a junior mortgagee for the rents and profits. *Gault* v. *Equitable Trust Co.*, 100 Ky. 578 (38 S. W. Rep. 1065). A purchaser of real estate at a foreclosure sale occupied by a lessee, whose lease embraces in addition to it, certain personal property, title to which did not pass by the decree, is not entitled to recover the full amount of the rent stipulated in the lease, but only such amount as is represented by the value of the use of the real estate. *Newton* v. *Speare Laundering Co.*, 19 R. I. 546 (37 Atl. Rep. 11). The assignment of rents of mortgaged property, to be received by the mortgagee and

applied upon the mortgage, is valid. *Kelley* v. *Bowerman*, 118 Mich. 446 (71 N. W. Rep. 836). Particular evidence held sufficient to show an assignment of rents to become due under a lease. *Griffith* v. *Burlingame*, 18 Wash. 429 (51 Pac. Rep. 1059). For consideration of particular case as to the proper distribution and apportionment of rent as between the owner and sublessor, see *Blackall* v. *Morrison*, 170 Ill. 152 (48 N. E. Rep. 705).

RESULTING TRUSTS.

EPITOME OF CASES.

Sec. 805. General principles. To establish a resulting trust the evidence must be full, clear and satisfactory. *Klamp* v. *Klamp*, 51 Neb. 17 (70 N. W. Rep. 525); *Barger* v. *Barger*, 30 Or. 268 (47 Pac. Rep. 702); *Spencer* v. *Terrell*, 17 Wash. 514 (50 Pac. Rep. 468); *Boyd* v. *Cleghorn*, 94 Va. 780 (27 S. E. Rep. 574). Where there is an express trust there can be no resulting or implied trust. *Myers* v. *Myers*, 167 Ill. 52 (47 N. E. Rep. 309). A trust does not result to the grantor merely because there was no consideration for the conveyance. *Tillaux* v. *Tillaux*, 115 Cal. 663 (47 Pac. Rep. 691). Particular cases in which the evidence was held insufficient to create a resulting trust. *Klamp* v. *Klamp*, 51 Neb. 17 (70 N. W. Rep. 525). Where a widow acquires title to her deceased husband's real estate through foreclosure of a mortgage made by him to a trustee to secure a debt to her, she paying nothing therefor except the cancellation of her debt and the costs of the foreclosure proceedings to which his heirs were parties, no trust results in their favor; and the same is true as to lands which she purchases with the rents and profits of her homestead. *Kyle* v. *Willis*, 166 Ill. 501 (46 N. E. Rep. 1121).

Sec. 806. Purchase with trust funds or in violation of trust relation. A pastor who collects money for the purpose of building a church and purchases a lot for that purpose,

taking the title in his own name, upon which a church is afterwards erected, will be held to hold the title in trust for the benefit of the church, although he subsequently ceases to be its pastor. *Gaines* v. *Drakeford*, 51 S. C. 87 (27 S. E. Rep. 960). Where one who is the agent of another to sell a mining claim, locates a conflicting claim which embraces a portion of his principal's claim, he will be held to hold such portion in trust for his principal. *Fisher* v. *Seymour*, 23 Colo. 542 (49 Pac. Rep. 80). Where one acting as the agent of another for the purchase of a piece of property, takes a conveyance thereof in his own name, paying the purchase money out of his principal's funds, he will hold the property in trust for his principal. *Sanford* v. *Hamner*, 115 Ala. 406 (22 So. Rep. 117). A purchase by an attorney charged with the business interests of his client and which is the result of advice given to the client, will inure to the benefit of the client, subject to his obligation to reimburse the attorney his expenses incident to the purchase and management of the property. *Brigham* v. *Newton*, 49 La. 1589 (22 So. Rep. 777). A trust fund may be pursued by the beneficiaries as long as the same can be identified, into any land or other form of investment made by the trustee, as the law raises an implied trust as to such property in their behalf. *Marshall's Ex'rs* v. *Hall*, 42 W. Va. 641 (26 S. E. Rep. 300). One who takes a deed from a trustee in violation of his trust, becomes an involuntary trustee of a trust cast upon him by operation of law. Cal. Civ. Code, §§ 2223, 2224, 2244, applied. *Nougues* v. *Newlands*, 118 Cal. 102 (50 Pac. Rep. 386). Where a pledgee of a mortgage note surrendered it to the mortgagee in order to enable him to consummate a deal with the mortgagor, whereby he was to receive a conveyance of the mortgaged premises in satisfaction of the debt, under an express agreement by the mortgagee to pay the pledgee's debt or secure its payment by the execution of a mortgage on the property, it is held that when the mortgagee received the note he assumed a fiduciary relation to the pledgee, so that upon the consummation of his transaction with the mortgagor and his subsequent repudiation of the agreement, a constructive trust arose in favor of the pledgee to the extent of his debt. *Lewis* v. *Lindley*, 19 Mont. 422 (48 Pac. Rep. 765). Particular evidence held sufficient to create a resulting trust where a pur-

chase was made by an administrator with trust funds. *Wolfe* v. *Citizen's Bank*, Tenn. (42 S. W. Rep. 89). Particular facts held insufficient to show the existence of the necessary fiduciary relation to create a constructive trust. *Stanford* v. *Mann*, 167 Ill. 79 (47 N. E. Rep. 814).

Sec. 807. Trusts arising out of fraud or violation of contract. Where a tax collector who was furnished with the necessary money by a tenant in common agreed to procure for him the title to the common estate by prosecuting an action for the collection of delinquent taxes and purchasing the property in the name of such tenant in common, violates his agreement by taking the title in his own name, the tenant in common is not prevented from maintaining an action against such tax collector or his grantee, to establish a trust in the land on account of the fact that he was not a defendant to the tax suit, or because he was using the machinery of the revenue law to perfect title in him, as against his cotenants, it appearing that they had consented to the arrangement. *Wolcott* v. *Wilsey*, 141 Mo. 200 (42 S. W. Rep. 825). Where a person having an equitable paper title to a tract of land, and out of possession thereof, with full knowledge of another's superior equitable title, by any means obtains the superior legal title, which rightfully belongs to the holder of the equitable title, and possession thereunder, so as to prevent the rightful acquirement thereof by the holder of the equitable title, and thus bars his suit at law for the possession of the land, equity will hold such person a trustee of the legal title for the benefit of such holder of the equitable title; the acquirement of the legal title under such circumstances being regarded as constructively fraudulent. Where the holder of the equitable title to a tract of land has the right to have his deed reformed by his remote grantors, so as to cover such tract of land, and others claiming adverse inequitable title to the same land from the same grantors, with full knowledge of the outstanding equity, by judicious management contrive, in fraud of the rights of the equitable holder, to perfect their inequitable title in such way as to prevent the correction of such deed in such manner by their common grantor, such others will be held as trustees of the legal title, and com-

pelled to convey the same to the holder of the equitable title. *Davis* v. *Settle*, 43 W. Va. 17 (26 S. E. Rep. 557).

Sec. 808. Trusts arising from the payment of purchase money. Whenever an estate is purchased in the name of one person and the consideration is paid by another, a trust is created by operation of law in favor of the party paying the purchase money. *Cox* v. *Cox*, 95 Va. 178 (27 S. E. Rep. 834). The trust must arise, if at all, at the time of the conveyance, and the money or other consideration for the deed which is the foundation of the trust, must then be paid or secured to be paid. *Barger* v. *Barger*, 30 Or. 268 (47 Pac. Rep. 702). Citing, *Taylor* v. *Miles*, 19 Or. 558 (25 Pac. Rep. 143); *Beecher* v. *Wilson*, 84 Va. 818 (6 S. E. Rep. 211; 10 Am. St. Rep. 883); *White* v. *Carpenter*, 2 Paige 238; *Niver* v. *Crane*, 98 N. Y. 47; *Westerfield* v. *Kimmer*, 82 Ind. 369; *Appeal of Cross*, 97 Pa. St. 474; *Botsford* v. *Burr*, 2 Johns., Ch. 408; *Midmer* v. *Midmer's Ex'rs*, 26 N. J. Eq. 302. Where one buys land under an executory agreement, and afterwards, before legal title is passed, verbally agrees that if another will pay the purchase money he shall have the land, and the other does so, the trust is enforcible in equity. *Currence* v. *Ward*, 43 W. Va. 867 (27 S. E. Rep. 329). Where one who agrees to loan the devisee of a mortgagor money with which to purchase the property at foreclosure sale and take a conveyance thereof as his security, purchases in his own name, a trust results in favor of the devisee. *Hebron* v. *Kelly*, 75 Miss. 74 (21 So. Rep. 799). Under How. Ann. Mich. Stat., § 5569, no use or trust results or can be raised by parol, in favor of one, who, in the absence of mistake, fraud or deceit, furnished the consideration for a conveyance, made with his knowledge or consent, to another, *Chapman* v. *Chapman*, 114 Mich. 144 (72 N. W. Rep. 131); applying this statute it is held that where a wife, to whom her husband conveyed land, for which he paid the purchase price under an understanding that she would so convey it as to vest the title in them jointly, executed a conveyance in pursuance of such understanding, it is, in the absence of fraud, valid as against her creditors. *Desmond* v. *Meyers*, 113 Mich. 437 (71 N. W. Rep. 877). Where a trust resulting from the

payment of purchase money is executed by a trustee making a conveyance to the beneficiary, the latter's title relates back to the time the trustee took his conveyance and the lien of a prior judgment against him does not attach to the land. *Davenport* v. *Stephens*, 95 Wis. 456 (70 N. W. Rep. 661). Where a widow to whom real estate is devised for life joins with the testator's children, who are to receive the land at her death, in a sale and conveyance of it, and the proceeds are invested in other land the title to which is taken in her name, a trust in such lands results in favor of the children in the same proportion that they would have taken the lands devised, and upon her death they may enforce their equitable title as against her devisee. *Roberts* v. *Remy*, 56 O. St. 249 (46 N. E. Rep. 1066). The exception to the rule creating a resulting trust on account of the payment of the purchase price which exists when the person in whose name the title is taken is one whom the purchaser is under obligation to support, does not apply where the parties to the transaction are brothers. *Camden* v. *Bennett*, 64 Ark. 155 (41 S. W. Rep. 854). Where a parent purchases land which he has conveyed to his son, it will *prima facie* be deemed an advancement so as to rebut the presumption of a resulting trust in the parent. *Kern* v. *Howell*, 180 Pa. St. 315 (36 Atl. Rep. 872; 57 Am. St. Rep. 641).

Sec. 809. Trusts arising from the payment of purchase money—Payment of an aliquot part. Where a resulting trust is sought to be enforced on account of the payment of part of the consideration for a conveyance, the evidence must show in a clear, concise and unequivocal manner, the exact proportion of the whole price actually paid, and that the payment was made for some specific part or distinct interest in the estate. *Barger* v. *Barger*, 30 Or. 268 (47 Pac. Rep. 702); *Camden* v. *Bennett*, 64 Ark. 155 (41 S. W. Rep. 854). In West Virginia it is held that one paying a definite and certain amount as part of the purchase price of land is entitled to enforce a trust in it to that extent regardless as to whether the sum paid be an aliquot part of the whole consideration or not. *Currence* v. *Ward*, 43 W. Va. 367 (27 S. E. Rep. 329). The court say: "So it be clear what amount is paid, it would seem

to be immaterial whether it be an aliquot part of the whole. Forty-nine is just as well a certain fraction of 100 as is 50. This theory likely originated in a statement by Lord Hardwicke in *Crop* v. *Norton*, 9 Mod. 233. He likely referred, not to payment of part of the purchase money, but to where several paid, intimating that there could be no resulting trust in favor of two or more paying, but only where one was the beneficiary. This even is not a tenable view, because in this later case of *Wray* v. *Steele*, 2 Ves. & B. 388, it was held that there could be a resulting trust in favor of several. This is now established. Hill, Trustees, 92, 93; 1 Perry, Trusts, § 132. As to Lord Hardwicke's statement, Chancellor Kent said it was not correct when only a single individual claimed the benefit, for the cases recognized the trust where the money of A. formed only a part of the consideration for the land purchased in the name of B. The land in such case is to be charged *pro tanto*. That is the case of *Botsford* v. *Burr*, 2 Johns., Ch. 405. Judge Story adopts the principle of the later cases. *Powell* v. *Manufacturing Co.*, 3 Mason 347 (Fed. Cas. No. 11,356). Some of the cases cited to sustain this proposition do not. *Baker* v. *Vining*, 30 Me. 121 (50 Am. Dec. 617), only holds, like our case of *Shaffer* v. *Fetty*, 30 W. Va. 248 (4 S. E. Rep. 278), that it must appear what amount the party claiming the trust paid, and that, where that was uncertain, no trust would be raised. *Fleming* v. *McHale*, 47 Ill. 282, cited for the proposition, is flatly against it, holding that, where the first payment is in full of one installment of purchase money under the contract, as in the present case, the rule of aliquot payment is complied with, whether the part paid is an exact divisor of the whole purchase price or not. *McGowan* v. *McGowan*, 14 Gray 119 (74 Am. Dec. 668), has no bearing on part payment of purchase money, but holds that the payment must be made for a distinct part or interest in the land. The books are indefinite as to this aliquot part expression; sometimes referring to a definite part of the land, sometimes of the money. See full note to *Neill* v. *Keese*, 5 Tex. 23 (51 Am. Dec. 758). Though the theory on which resulting trust rests is that the payment made becomes converted into land, and is not a lien on it, that refers rather to the time of payment (that is, that it must be before the legal

title is taken), rather than to the portion of the money paid, or of the interest in the land springing therefrom; for where both have paid they can have joint interest in the land proportionately to the money paid (that is, the party who is to hold as trustee and the beneficiary), just as where there are two or three beneficiaries paying separate amounts. So if one pays $49 and another $51, their interests would be 49–100 and 51–100, respectively, just as reasonably as if each had paid $50. It is only necessary that it be clearly shown what part he has paid (*Shaffer* v. *Fetty*, 30 W. Va. 248 (4 S. E. Rep. 278); Hill, Trustees, 92, note 2; 1 Perry, Trusts, § 132); but there must be certainty as to interest in the land."

Sec. 810. Trusts arising from the payment of purchase money—Conveyance to husband or wife. While it is possible for an implied trust to arise in favor of a husband who has paid for real estate conveyed to his wife, the presumption of the law is against such a trust, and, to overcome this presumption the proof must be strong and clear. *Danforth* v. *Briggs*, 89 Me. 316 (36 Atl. Rep. 452); *Kobarg* v. *Greder*, 51 Neb. 365 (70 N. W. Rep. 921). Where a husband purchases real estate with his own funds and causes the legal title thereof to be conveyed to his wife, the presumption is that the husband intended such real estate as a gift to his wife. *Kobarg* v. *Greder*, 51 Neb. 365 (70 N. W. Rep. 921). Ordinarily a conveyance to the wife at the instance of the husband is presumed to be by advancement or gift; but this presumption may be overcome by proof of his acts in reference to dealing with the property and the existence of family relations which clearly indicate that he had a contrary intention. *Pool* v. *Phillips*, 167 Ill. 432 (47 N. E. Rep. 758). The court quote approvingly from Perry on Trusts, § 147, as follows: "Whether a purchase in the name of a wife or child is an advancement or not is a question of pure intention, though presumed in the first instance to be a provision and settlement. Therefore any antecedent or contemporaneous acts or facts may be received either to rebut or support the presumption, and any acts or facts so immediately after the purchase as to be fairly considered a part of the transaction may be received for the same purpose." Particular evidence held sufficient to

overcome the presumption that a conveyance of land paid for by the husband, to his wife, was intended as an advancement. *Hagan* v. *Powers*, 108 Ia. 598 (72 N. W. Rep. 771).

No trust results to a wife on account of her paying the purchase price for land, where the title is taken in the name of her husband at her request. *Henderson* v. *Baniel*, Tenn. (42 S. W. Rep. 470). Where a husband, after appropriating to his own use money given to him by his wife to invest in a lot for her, purchases the lot on his own credit, no trust results to her, although she believed that her money was used in the purchase, and on the faith of such belief erected improvements on the land. *Clark* v. *Timmons*, Tenn. (39 S. W. Rep. 534). No trust results in favor of the wife in lands conveyed to her husband on account of her father paying part of the purchase price and charging the same as an advancement to her. *Lewis* v. *Stanley*, 148 Ind. 351 (45 N. E. Rep. 693); *Lewis* v. *Stanley*, 148 Ind. 351 (47 N. E. Rep. 677). Under Ky. Stat. 1894, § 2358, providing that no use or trust shall result in favor of one paying the consideration where the conveyance is made to another with his knowledge, it is held that a conveyance of land purchased by the husband, to his wife, with his knowledge, does not create a trust in his favor. *Watt* v. *Watt*, Ky. (39 S. W. Rep. 48). Particular evidence held insufficient to establish a resulting trust in favor of a husband in lands, the legal title to which was taken in the name of his wife. *Kobarg* v. *Greder*, 51 Neb. 365 (70 N. W. Rep. 921); *Spencer* v. *Terrel*, 17 Wash. 514 (50 Pac. Rep. 468). Particular evidence held sufficient to establish a resulting trust in favor of a wife in lands, the legal title to which was taken in the name of her husband. *Beringer* v. *Lutz*, 179 Pa. St. 1 (37 Atl. Rep. 640); *Olinger* v. *Shultz*, 183 Pa. St. 469 (38 Atl. Rep. 1024). Particular evidence held insufficient to show that lands conveyed to a husband were bought with his wife's money so as to create a resulting trust in her favor. *Barger* v. *Barger*, 30 Or. 268 (47 Pac. Rep. 702).

Sec. 811. Trusts arising from the payment of purchase money—Particular cases. Where lands upon which a testator held a senior judgment were about to be sold on a

junior judgment, part of his heirs authorized his executor to purchase at the sale and apply their interest in the judgment in payment of his bid, they agreeing to supply funds to pay any excess, which arrangement is carried out and the executor takes a conveyance in his name as executor, it is held that he holds the title in trust for the heirs consenting to such arrangement and this trust is not affected by the fact that part of the heirs did not consent to it. *Gumaer* v. *Barber*, 182 Pa. St. 81 (37 Atl. Rep. 848). Applying Ky. Gen. Stat., ch. 63, art. 1, § 19, it is held that where a son furnished money to his father to be invested by the latter for the son, he could enforce a resulting trust in the lands purchased with such funds and conveyed to the father without the son's consent. *Harlan* v. *Eilke*, 100 Ky. 642 (38 S. W. Rep. 1094). Ky. Stat. 1894, § 2353, applied—trust resulting from the payment of purchase price. *Neel* v. *Moore*, · Ky. (39 S. W. Rep. 1042). Particular evidence held sufficient to establish a resulting trust on account of the payment of the purchase price. *Cox* v. *Cox*, 95 Va. 178 (27 S. E. Rep. 884); *Camden* v. *Bennett*, 64 Ark. 155 (41 S. W. Rep. 854). Particular evidence held sufficient to establish a resulting trust on account of payment of part of the purchase price. *Rayl* v. *Rayl*, 58 Kan. 585 (50 Pac. Rep. 501); evidence held insufficient. *Fowler* v. *Webster*, 180 Pa. St. 610 (37 Atl. Rep. 102).

RIGHT OF WAY.

EPITOME OF CASES.

Sec. 812. Acquiescence in use of land for a railroad right of way—Remedies of landowner. Since the enactment of Wis. Rev. Stat., § 1852, where the owner of land permits a railway company to locate, operate and construct its road thereon, he thereby waives all his former remedies for the recovery of the land or for injuries to it and is confined to the preceedings for compensation under the statute. *Hooe* v. *Chicago, M. & St. P. R. Co.*, 98 Wis. 302 (73 N. W. Rep. 787). Construing Ohio Rev. Stat., §§ 6448, 6449, it is held that where

a railroad company has taken possession of land for its right of way, and incorporated it as part of its permanent railroad track, with the verbal consent of the owner, on condition of compensation verbally promised, but refused and not performed, and without appropriation proceedings, and without any agreement in writing with the owner, such owner has an election of remedies, either to proceed in the probate court to compel appropriation, or by assenting to such possession by the company as an appropriation in fact, and tendering conveyance, to proceed in the court of common pleas to recover compensation. Such proceeding for compensation cannot be enlarged to include an inquiry of damages to other lands, but the jurisdiction of the court of common pleas is not ousted by allegations of damages to other lands, and prayer for recovery by reason thereof. The proceeding to compel an appropriation is not barred by the lapse of less than twenty-one years from the time of such occupancy by the company. *Fries* v. *Wheeling & L. E. Ry. Co.*, 56 O. St. 185 (46 N. E. Rep. 516).

Sec. 813. Grants of right of way—Construction. Construing a warranty deed of the right of way of a railroad company which provided that "this deed is made subject to the condition that in case said land shall cease to be used for railroad purposes, the same shall revert to the first parties, their heirs and assigns," it is held that the deed vested in the railroad an estate upon condition subsequent and not upon conditional limitation, and that nothing short of a permanent abandonment of the use of the property for railroad purposes would amount to a breach of the condition. Dunbar, J., dissenting. *Mouat* v. *Seattle L. S. & E. Ry. Co.*, 16 Wash. 84 (47 Pac. Rep. 233). A provision in the grant of a right of way to a railroad company releasing it and its successors and assigns "from all costs and damages which the said party of the first part has now sustained or may at any time hereafter sustain in any way by reason of the construction, building, or use of the said railroad," does not bar the grantor nor those subsequently claiming under him, from recovering damages resulting to their land from the negligent construction, maintenance, or operation of the road. *Fremont, E. & M. V. R. Co.* v. *Harlin*, 50 Neb. 698 (70 N. W. Rep. 263; 61 Am. St.

Rep. 578; 86 L. R. A. 417). To the same effect are the cases of *Brown* v. *Pine Creek Ry. Co.*, 188 Pa. St. 38 (38 Atl. Rep. 401); *Jungblum* v. *Minneapolis N. U. & S. W. R. Co.*, 70 Minn. 153 (72 N. W. Rep. 971). Where the owners of a mill who had constructed upon their land a side track to a railroad, entered into a contract with persons erecting a saw mill near by, in which it was stipulated that, for a valuable consideration they "do, by these presents, grant, bargain, sell, remise, release, alien, and confirm unto the said parties of the second part, their heirs and assigns, forever, the undivided one-half of the said side track or railroad; to have and to hold the said side track to the said parties of the second part, their heirs and assigns, to the sole and only proper use, benefit, and behoof of the said parties of the second part, their and assigns, forever," it is held that the instrument constituted a conveyance of a right of way appurtenant to the grantee's mill and not a mere license; that it was not personal to the grantees but passed to their heirs and assigns, and that the subsequent removal and reconstruction on another line, of a portion of the side track, by the consent of the assignee of the original grantee under an agreement that its rights should not be thereby affected, was not an abandonment. *Kent Furniture Co.* v. *Long*, 111 Mich. 383 (69 N. W. Rep. 657). Construction of particular conveyance of right of way for railroad across a brickyard. *Elkhart & W. R. Co.* v. *Waldorf*, 17 Ind. App. 29 (46 N. E. Rep. 88). Minn. Gen. Stat. 1894, §§ 4590, 4591—contracts for right of way over lands of deceased persons or persons under guardianship—amended, Laws 1899, p. 208.

Sec. 814. Title to and use of right of way. A statute (Mo. Laws 1850–51, p. 259), authorizing plank road companies with the consent of the county court, to construct toll roads upon public highways, which provides that the highways so occupied "shall become the property of said company for the purpose of making and maintaining said road and the gates and toll houses thereon," gives such a company so using the highway only an easement therein, and upon the expiration of the company's charter the improved road reverts to the public as a highway free of tolls. *State* v. *Hannibal &*

R. C. Gravel-Road Co., 138 Mo. 332 (39 S. W. Rep. 910; 36 L. R. A. 457). The estate acquired by a railroad company in its right of way under the presumption of a grant created by N. C. Acts 1868, ch. 26, § 8, where there has been no contract concerning the land or appropriation of it, is only an easement in the land to an extent necessary for its purposes in the conduct of its business. Faircloth, C. J., dissenting. *Raleigh & A. Air-Line R. Co.* v. *Sturgeon*, 120 N. C. 225 (26 S. E. Rep. 779). A railroad company has the right to designate the places abutting on its depot platforms where the owners of competing omnibus lines shall stand their vehicles while awaiting the arrival and departure of trains and where they shall receive and discharge passengers and baggage. *Lucas* v. *Herbert*, 148 Ind. 64 (47 N. E. Rep. 146). Ia. Code 1880, § 1260 (McClain's Code, § 1928), construed and applied—estate taken by railroad in right of way—reversion upon failure to use. *Smith* v. *Hall*, 103 Ia. 95 (72 N. W. Rep. 427).

Sec. 815. Highway and farm crossings. Legislative authority, under the police power of the state, extends to all matters necessary to a safe crossing of a railway track by a highway, and without regard to whether exercised before or after the construction of the railroad, or before or after the construction of the highway, or whether the highway existed at the time of the construction of the railroad, or was thereafter constructed across it. The requirement for the construction and maintenance of cattle guards, warning posts, crossing signs, crossing gates, and the planking of tracks are equally proper subjects for police regulations when the legislature shall see fit to exercise its authority in that regard. Wis. Rev. Stat., § 1836, in regard to the restoration of highways crossed by railroads, does not apply to a highway constructed after the construction of the railroad which it crosses; but § 1809, in regard to crossing signs, and § 1810, in regard to the construction and maintenance of cattle guards, apply to all railroads without respect to when constructed. *Chicago, M. & St. P. Ry. Co.* v. *City of Milwaukee*, 97 Wis. 418 (72 N. W. Rep. 1118). See opinion for extensive collection of authorities as to the exercise of police power over rail-

roads. Ia. Code 1878, § 1288, which requires a railway corporation to "construct at all points where such railway crosses any public highway, good, sufficient, and safe crossings and cattle guards at such points at a sufficient elevation from such highway to admit the free passage of vehicles of every kind, and a sign with large and distinct letters placed thereon to give notice of the proximity of the railway," is held not to include overhead crossings. *City of Albia* v. *Chicago, B. & Q. R. Co.*, 102 Ia. 624 (71 N. W. Rep. 541). Where one whose lands are severed by a railroad right of way has a right to the use of a crossing, this right passes to a grantee of a portion of the premises situated wholly on one side of the right of way. *Rathbun* v. *New York, N. H. & H. R. Co.*, 20 R. I. 60 (37 Atl. Rep. 800).

RIPARIAN OWNERS.

GEHLEN v. KNORR.

(101 Iowa 700.)

Right of riparian owner to erect dam to form an ice pond. Where the usefulness of his dam will be only temporarily impaired, a riparian owner who has acquired by condemnation the right to maintain a mill dam, which only supplies one-fourth of the power for his mill, can not enjoin an upper owner from erecting a dam to form an ice pond to furnish ice to sell, although a prior grantor of the latter was a party to the condemnation proceedings establishing the mill dam, he having received no award of damages therein.

Sec. 816. Statement of the case. This is an action in equity by the plaintiffs to restrain the defendants from erecting a dam across the Floyd river, at any point thereon within such distance above plaintiffs' dam as would interrupt or stop the natural flow of the water in said stream to plaintiffs' detriment. The plaintiffs allege: That they own and operate a steam and water power grist mill which was erected in 1870, and has since been used as a flouring mill. That part of the power with which said mill has been operated was derived from water taken from said river, and, to utilize the

water of said river, a dam was built, which has ever since been maintained. Before erecting said dam, the then owner of said mill site brought an action in the proper court against parties owning land adjacent to said river above the point where said dam was thereafter located, and which might be overflowed by backwater from the dam, to which action Jacob Rubel was made a defendant. He then owned the land upon which the dam objected to by the plaintiffs was afterwards built. That the free and uninterrupted flow of the water in said river above plaintiffs' dam is essential for the full enjoyment and operation of plaintiffs' mill. It is averred, that the defendants are about to construct a dam, which will stop the flow of the water down said stream, which would irreparably damage plaintiffs. The defendants admit the ownership of the property where said dam was proposed to be built; that they expected to erect a dam thereon for the temporary purpose of forming a pond of water from which to harvest ice during the winter months, and say that such acts would not divert the flow of the river, or decrease the volume of water therein. They deny all other allegations of the petition. A temporary injunction issued as prayed, and on final hearing it was made perpetual. Defendants appeal. Reversed.

KINNE, C. J.

Sec. 817. Rights acquired by condemnation proceedings establishing a mill dam. Plaintiffs claim that by virtue of the condemnation proceedings they have acquired a right, as against the defendants, not only to flow the water back upon their land, but also a right to the use and enjoyment of the water of the stream which they would not otherwise possess as riparian owners.

In the condemnation proceedings it appears that the defendant Rubel, the owner of the land, was found not entitled to any compensation for damages. It is fair to presume, in view of this and of other evidence in this case, that such finding was based upon the theory that the back water from the plaintiffs' dam would not overflow Rubel's land, and hence he was not entitled to damages. We think the testimony in the case before us shows that ever since the erection of plaintiffs' dam there has been a current in the river below

Rubel's land, hence it can not be said to be affected with backwater from the dam. Such being the case, plaintiffs acquired no right as against the upper landowner, Rubel, to the water itself or its use, which is not enjoyed by riparian owners generally.

Sec. 818. Riparian rights as to artificial use of water by erecting dams—Reasonable use—Interference with others—Principles discussed and authorities collated. We first proceed to state the law applicable to this case. We shall then be better able to apply it to the facts as they are disclosed by this record. Plaintiffs use the waters of the stream for propelling, in part, the machinery of their mill. Defendants propose to use the water from the same stream, in a congealed state, in the form of ice, which is to be gathered for sale. Both uses are what are known in law as artificial, as distinguished from natural uses. *Willis* v. *City of Perry*, 92 Iowa 297 (60 N. W. Rep. 729; 26 L. R. A. 124). We need only consider then, what the law is as to the rights of riparian owners to the use of the waters of a nonnavigable stream for artificial purposes. Some general propositions may well be stated. The law is that as to such use, and in the absence of superior rights acquired by license, grant, or prescription, the rights of such proprietors in the water of the stream are equal. *Willis* v. *City of Perry*, 92 Iowa 297 (60 N. W. Rep. 729; 26 L. R. A. 124). It follows, therefore, that the defendants had the right to use the water reasonably, having reference to plaintiff's rights therein. Washb. Easem., p. 379. Broadly stated, the general rule is that the owner of land through which a stream of water runs has a right to have it flow over his land in the natural channel, undiminished in quantity, and unimpaired in quality, except in so far as diminution or contamination is inseparable from a reasonable use of such water. *Willis* v. *City of Perry*, 92 Iowa 297 (60 N. W. Rep. 729; 26 L. R. A. 124); *Furguson* v. *Manufacturing Co.*, 77 Iowa 578 (42 N. W. Rep. 448; 14 Am. St. Rep. 319); *Spence* v. *McDonough*, 77 Iowa 462 (42 N. W. Rep. 371); 28 Am. Eng. Enc. Law, p. 948; *Elliot* v. *Railroad Co.*, 10 Cush. 191 (57 Am. Dec. 85, notes); *Moulton* v. *Water Co.*, 137 Mass. 163; *Garwood* v.

Railroad Co.; 88 N. Y. 400 (88 Am. Rep. 452); *Hydraulic Co.* v. *Butler*, 91 Ind. 188 (46 Am. Rep. 580); *Heilbron* v. *Canal Co.*, 75 Cal. 426 (17 Pac. Rep. 535); *Dumont* v. *Kellog*, 29 Mich. 420 (18 Am. Rep. 102); *Mining Co.* v. *Dangberg*, 2 Sawy. 450 (Fed. Cas. No. 14,870); *Tyler* v. *Wilkinson*, 4 Mason, 397 (Fed. Cas. No. 14,312); *Bullard* v. *Manufacturing Co.*, 77 N. Y. 530; *Palmer* v. *Mulligan*, 3 Caines, 307 (2 Am. Dec. 270); *Davis* v. *Getshell*, 50 Me. 602 (79 Am. Dec. 636, note); *Wadsworth* v. *Tillotson*, 15 Conn. 366 (39 Am. Dec. 391); *Haskins* v. *Haskins*, 9 Gray, 390; *Snow* v. *Parsons*, 28 Vt. 459 (67 Am. Dec. 723); *City of Springfield* v. *Harris*, 4 Allen, 494 (81 Am. Dec. 715); *Red River Roller Mills* v. *Wright*, 30 Minn. 249 (15 N. W. Rep. 167; 44 Am. Rep. 194). No statement can be made as to what is such reasonable use which will, without variation or qualification, apply to the facts of every case. But in determining whether a use is reasonable we must consider what the use is for; its extent, duration, necessity, and its application; the nature and size of the stream, and the several uses to which it is put; the extent of the injury to the one proprietor, and of the benefit to the other and all other facts which may bear upon the reasonableness of the use. *Red River Roller Mills* v. *Wright*, 30 Minn. 249 (15 N. W. Rep. 167; 44 Am. Rep. 194), and cases cited; Washb. Easem. 379. Now, while one riparian proprietor may not divert the water of a stream so as to deprive a lower proprietor on the same stream of the benefit thereof, such upper proprietor may reasonably detain the water for proper purposes. Washb. Easem., p. 380; *Hydraulic Co.* v. *Butler*, 91 Ind. 188 (46 Am. Rep. 580); 28 Am. Eng. Enc. Law, p. 955; Gould, Waters, § 213; Ang. Water Courses, §§ 90–96; *Gillett* v. *Johnson*, 30 Conn. 180. The doctrine that such use by the upper proprietor may result in diminishing the quantity of water which will go down the stream, and may affect the current by retarding the flow to a reasonable extent, and still be consistent with the existence of a common right, was early held in this country, and has been constantly adhered to. *Tyler* v. *Wilkinson*, 4 Mason 397 (Fed. Cas. No. 14,312); *Dumont* v. *Kellog*, 29 Mich. 420 (18 Am. Rep. 102); *Bullard* v. *Manufacturing Co.*, 77 N. Y. 530; *Ice Co.* v. *Guthrie*, 42

Neb. 288 (60 N. W. Rep. 717; 28 L. R. A. 581); Gould, Waters, § 191; *Palmer* v. *Mulligan*, 3 Caines 307 (2 Am. Dec. 270); *Davis* v. *Getchell*, 50 Me. 602 (79 Am. Dec. 636); *Van Hoesen* v. *Coventry*, 10 Barb. 518; *Iron Co.* v. *Trullinger*, 8 Or. 1; 3 Kent, Comm., p. 439; *Keeney & Wood Manuf'g Co.* v. *Union Manuf'g Co.*, 39 Conn. 577; *Timm* v. *Bear*, 29 Wis. 254; *Whaler* v. *Ahl*, 29 Pa. St. 98; *Gould* v. *Duck Co.*, 13 Gray 442. If the general rule that each riparian proprietor is entitled to the flow of the stream according to its natural course, without interruption or diminution, should be strictly adhered to, it would result in a virtual abrogation of the well-settled doctrine that the rights of all proprietors of the stream are equal, and would "preclude the use of flowing waters in most cases; as, where power is desired, the rule must yield to the necessity of gathering the water into reservoirs. It is lawful to do this where it is done in good faith, for a useful purpose, and with as little interference with the rights of other proprietors as is reasonably practical under the circumstances." Cooley, Torts (1st Ed.), p. 584; *Tyler* v. *Wilkinson*, 4 Mason 397 (Fed. Cas. No. 14,312). In *Dumont* v. *Kellog*, 29 Mich. 420 (18 Am. Rep. 102), it was held, in an action by a mill proprietor against one having a mill and dam above him, on the same stream, for damages caused by detention of the water, that it could not be said that such upper proprietor had no right to use the water to the prejudice of such lower proprietor; nor could it be held that such upper proprietor could not lawfully divert any of the water which would otherwise flow down the stream. The court said the real question was, "whether, under all the circumstances of the case, the use of the water by one is reasonable, and consistent with a corresponding enjoyment of right by the other." In *Bullard* v. *Manufacturing Co.*, 77 N. Y. 580, it is said that the fact that an injury results to other riparian owners from the construction and use of dams is not decisive upon the question as to whether such use is permissible. In that case the upper proprietor had interfered with the flow of water by collecting the water at times in a pond, and while it was so collecting plaintiff had not sufficient water to use his mill. The court of appeals sustained a finding by the lower court that the detention of the water by the upper

proprietor was not unreasonable. In *Palmer* v. *Mulligan*, 3 Caines 307 (2 Am. Dec. 270), the court said: "The erection of dams on all rivers are injurious in some degree to those who have mills on the same stream below them by withholding the water, and by a greater evaporation in consequence of the increased surface; yet such injuries, I believe, were never thought to afford a ground of action." In *Merritt* v. *Brinkerhoff*, 17 Johns. 306 (8 Am. Dec. 404), it is said: "The common use of the water of a stream by persons having mills above is frequently, if not generally, attended with damage and loss to the mills below, but that is incidental to the common use, and for the most part unavoidable. If the injury is trivial, the law will not afford redress, because every person who builds a mill does it subject to that contingency. The person owning an upper mill on the same stream had a lawful right to use the water, and may apply it in order to work his mills to the best advantage, subject, however, to this limitation: that if, in the exercise of this right, and in consequence of it, the mills lower down on the stream are rendered useless and unproductive, the law in that case will interpose and limit the common right so that the owners of the lower mills shall enjoy a fair participation." In *Davis* v. *Getchell*, 50 Me. 602 (79 Am. Dec. 636, note), it is held such riparian owners may, to a reasonable extent, diminish the volume of water, and may detain it a reasonable time in order to accumulate a head which can be made available for practical use. *Timm* v. *Bear*, 29 Wis. 254; *Whaler* v. *Ahl*, 29 Pa. St. 98. In *Keeney & Wood Manuf'g Co.* v. *Union Manuf'g Co.*, 39 Conn. 577, it is said: "The right of a proprietor above to make the water useful to him by detaining it long enough to render it useful is of the same quality as of the proprietor below to take the water out of the course of the current for use, when both parties are applying the water to the artificial use of propelling machinery." In *Gould* v. *Duck Co.*, 13 Gray 442, it is held that an upper proprietor may, under proper circumstances, detain the water of a stream so long as may be necessary to raise the requisite head, and accumulate such a quantity as will enable him to use the water in propelling his machinery.

Sec. 819. Same—Application of principles to the facts of the case. Now, applying the law to the facts of this case, we are required to determine whether the use by the defendants was, under all of the circumstances, a reasonable use. If it was, plaintiffs were not entitled to any relief. Plaintiffs' mill was operated in part by steam and in part by water power. It had three water wheels of 100, 80, and 25 horse power, respectively. Its capacity is 150 barrels of flour and 5 car loads of feed per day. Ordinarly about 75 per cent. of the power was furnished by the engine and 25 per cent. by the water. For several years, and since the capacity of the mill was doubled, there has not been water sufficient to operate the mill at anywhere near its full capacity. The stream is now about a foot deep and three feet wide. Plaintiffs' evidence tends to show that after the defendants erected their dam plaintiffs were compelled to reduce their output of flour about 15 barrels per day; that before the erection of the defendants' dam, as well as after it had been removed, the plaintiffs had two feet of water in their race, and four feet on the wheels; and that while said dam remained plaintiffs had about three inches of water in their race and two feet on the wheels. Defendants' dam was built for the sole purpose of collecting and retaining sufficient water in the pond so that ice could be cut and taken therefrom during the winter season. It took about two days and one night to fill this pond, and when filled, water flowed over it or through a chute. Plaintiffs themselves had for years cut, or permitted to be cut, large quantities of ice from their mill pond, and assert that it had not interfered with the volume of water, or with the operation of their mill. It is not claimed that there was any diversion of the water by the defendants, unless the taking of ice from their pond could be treated as such. The claim is that the defendants by erecting their dam, detained the water in a pond, and thereby the water is spread out over a broader surface, and soaks into the ground; also, that more is lost by evaporation than would be if the stream was left to its natural flow. As to the damage by soaking and evaporation, in view of the authorities cited, we do not think the plaintiffs can be heard to complain of it. Both parties had a dam and a pond, and it may fairly be presumed that the loss by soakage and

evaporation is a necessary result of the reasonable use of the stream by any one for artificial purposes, and therefore it would furnish no cause of action to the plaintiffs. We think it is fair to say, from all of the evidence, that, after the defendants' pond had filled, the flow of water therefrom down the stream to the plaintiffs' pond would not have been materially interfered with. It may be that the taking of ice from the pond,—which, of course, resulted in the removal of that much water, in a congealed state—would slightly decrease the quantity of water which would flow down to plaintiffs' pond, but it is evident, from the evidence, that its effect would not be such as to justify a court in preventing defendants from using the water as they proposed, unless there is a different rule applying to the right to remove ice from that governing the right to use water, which questions we shall consider later. We do not think that a detention of the water for two or three days by defendants, while their pond was filling, can be said to be an unreasonable detention. It is clear that the use of the water of the stream for any artificial use whatsoever by the defendants would require the erection of a dam, and the detention of the water long enough to fill the pond. If they had not the right to do this, they would not be placed upon an equality of right with the plaintiffs as to the use of the water. If the contention of plaintiffs be sustained, the result would be that, in effect, they would be given the rights in the water of the river superior to all persons above them, so far as artificial uses are concerned; and upper riparian owners would be deprived of all right to use the water for artificial purposes. Such a holding would not be in accord with the rules of the law applicable to such cases, and would be most inequitable and unjust. These parties are, by the law, placed upon an equality as to their right to use the water of this stream, and neither may exercise his right as to unduly interfere with the rights of the other; still both must put up with such slight disadvantages as are indispensible to a reasonable use by the other.

Sec. 820. Riparian rights in respect to ice. The rights of the parties to the use of the water of the stream are in no wise affected by the fact that it was proposed to

remove the water in its congealed state. In *Brown* v. *Cunningham*, 82 Iowa 512 (48 N. W. Rep. 1042; 12 L. R. A. 583), it is held that the same rights to ice exist which may be held to the water, "for ice is water in another form,—congealed water." In *Marsh* v. *McNider*, 88 Iowa 395 (55 N. W. Rep. 469; 45 Am. St. Rep. 240; 20 L. R. A. 333), it is held that ice in a running stream is, in most respects, subject to the rules which govern the rights of the riparian proprietor to the water. That the defendants' right to the ice is the same as in the water before it is congealed is well settled. *Elliot* v. *Railroad Co.*, 10 Cush. 191 (57 Am. Dec. 85); *Stevens* v. *Kelley*, 78 Me. 445 (6 Atl. Rep. 868; 57 Am. Rep. 813); *Cummings* v. *Barrett*, 10 Cush. 186; *Hydraulic Co.* v. *Butler*, 91 Ind. 138 (46 Am. Rep. 580); *State* v. *Pottmeyer*, 33 Ind. 402 (5 Am. Rep. 224); *Ice Co.* v. *Guthrie*, 42 Neb. 238 (60 N. W. Rep. 722; 28 L. R. A. 581); *Bigelow* v. *Shaw*, 65 Mich. 341 (32 N. W. Rep. 800; 8 Am. St. Rep. 902). The rule is stated in several of the cases above cited, that the owner of the soil under a nonnvavigable water course has the right to cut and remove the ice from the stream adjoining his land in any quantity, and to any extent, for his own use, or for storage or sale, if he does not thereby appreciably diminish the head of water at the dam of the lower proprietor. *Payne* v. *Woods*, 108 Mass. 172; *Searle* v. *Gardner*, Pa. (13 Atl. Rep. 835); *Howe* v. *Andrews*, 62 Conn. 398 (26 Atl. Rep. 394); Gould, Waters, § 191. We have not discussed the evidence in detail in this case; indeed, we have not referred to all of it, but we have fully considered it in arriving at our conclusions. There is evidence tending to show that the backwater from plaintiffs' pond flowed over some of the land where defendants' dam and pond were situated, but we are impressed with the conviction that the weight of the evidence, in view of all the facts, is to the contrary. We are of the opinion that defendants had a right to build the dam, and to reasonably detain the water until their pond was filled, and to remove and sell the ice which might be formed thereon, and that whatever damage plaintiffs sustained by reason thereof was necessarily incident to such reasonable use, and hence furnished no cause of action to the plaintiffs. In view of the disposition made of the case, we need not pass

upon the appellees' motion. For the reasons given, the decree of the district court is reversed. Ladd, J., takes no part.

Sec. 821. Ice—Riparian rights. A riparian owner has the right to cut all the ice which forms on the portion of the stream owned by him and may lease this privilege to another. *Oliver* v. *Olmstead*, 112 Mich. 483 (70 N. W. Rep. 1036). As to whether ice is real estate or personal property, see Ballards' Law Real Prop., Vol. I, § 111. Ice formed on that part of the bed of a stream included in leased premises belongs to the lessee if there is nothing in the lease restricting his use of the property. *Marsh* v. *McNider*, 88 Ia. 390 (55 N. W. Rep. 469; 45 Am. St. Rep. 240; 20 L. R. A. 333). Ice formed on land appropriated by a water supply company under the right of eminent domain belongs to the water company and not to the owner of the fee. *Wright* v. *Woodcock*, 86 Me. 113 (29 Atl. Rep. 953; 25 L. R. A. 499). A mill owner who has the right to flow back the waters of a non-navigable stream upon the lands of another in order to maintain his mill-dam, does not own the ice formed from such water, but it belongs to the owner of the land who may remove it when he can do so without damage to the mill owner, and he may recover damages off the latter for his willful interference with this right. *Stephens* v. *Kelley*, 78 Me. 445 (57 Am. Rep. 813); *Eidemiller Ice Co.* v. *Guthrie*, 42 Neb. 238 (60 N. W. Rep. 717; 28 L. R. A. 581). In the last case the court say: "There is, or propably it may more correctly be stated, there was, some contrariety of opinion, as expressed in the decisions of the courts, in reference to which one is the owner of ice upon a mill pond,—the party who erected the dam, and owns the right to the water, and to flow or hold it back, or the party holding the legal title to the land (the riparian owner); but where the stream is of the character of the one which figures in this case, i. e. not navigable, we are satisfied both reason and precedent support the doctrine that the riparian owner has the right to use all the water which it is necessary for him to employ for any purpose, and to cut and remove the ice which may form upon the stream adjoining his land, in any quantity or to any extent, for his own use, or to store for sale, provided he does not by so doing, diminish or decrease the flow of water to the mill, below what is required to successfully operate or run the mill. Gould, Waters, § 191, and cases cited; *Stephens* v. *Kelley*, 78 Me. 445 (6 Atl. Rep. 868; 57 Am. Rep. 813); *Hydraulic Co.* v. *Butler*, 91 Ind. 134 (46 Am. Rep. 580), and cases cited; *Washington Ice Co.* v. *Shortall*, 101 Ill. 46 (40 Am. Rep. 196). 'The riparian owner and the person who flows have each a qualified right in the ice which forms in an artificial pond, i. e. the mill owner has the right to have the ice remain, if its removal will appreciably diminish the head of the water at his dam, and the riparian owner the right to cut and remove the ice if its removal will not appreciably diminish such head.' *Bigelow* v. *Shaw*, 65 Mich. 341 (32 N. W. Rep. 800; 8 Am. St. Rep. 902); *Paine* v. *Woods*, 108 Mass. 172; *Searle* v. *Gardner*, Pa. (13 Atl. Rep. 835); *Cummings* v. *Barrett*, 10 Cush. 186; *Marsh* v. *McNider*, 88 Ia. 390 (55 N. W. Rep. 469; 45 Am. St. Rep. 240; 20 L. R.

A. 333); *Howe* v. *Andrews*, 62 Conn. 398 (26 Atl. Rep. 394)." For additional authorites upon the subject of the rights of riparian owners in respect to ice, see Ballards' Law Real Property, Vol. II, § 652; Vol. III, § 679; Vol., V., § 799.

EPITOME OF CASES.

Sec. 822. Riparian rights—General principles. Riparian rights are property which cannot be taken without compensation. *Allison* v. *Davidson*, Tenn. (39 S. W. Rep. 905). In order for a landowner to have riparian rights, his land must not only be contiguous to the water but in contact with it. Proximity without contact is insufficient. *Slauson* v. *Goodrich Transp. Co.*, 94 Wis. 642 (69 N. W. Rep. 990). Where one is a riparian owner upon two streams to a point below their junction, the appropriation, by condemnation proceedings by a municipality, of the waters of one of the streams does not affect his riparian rights in the other, nor can he recover damages in such proceedings on account of such appropriation increasing his use of the other stream so as to make him liable for damages to lower owners thereon. *New London Water Board* v. *Perry*, 69 Conn. 461 (37 Atl. Rep 1059).

Sec. 823. Title to land covered by, and use of waters. Where the riparian owner owns the fee of land covered by waters not navigable for any useful purpose, he may maintain trespass against strangers who go upon it in boats and hunt wild fowl against his will. *Hall* v. *Alford* 114 Mich. 165 (72 N. W. Rep. 137; 38 L. R. A. 205). A riparian owner who has purchased the right to use a certain amount of water is entitled to use or waste that amount as he may see fit, as against an upper owner who took subject to the purchase. *Home Elec. L. & P. Co.* v. *Globe Tissue-Paper Co.*, 146 Ind. 678 (45 N. E. Rep. 1108). A railroad company's right to use water taken from lands leased from a riparian owner, is subject to the right of a water company to appropriate the waters on such land under the right of eminent domain. *Philadelphia & R. R. Co.* v. *Pottsville Water Co.*, 182 Pa. St. 418 (38 Atl. Rep. 404). One who has acquired a prescriptive right to maintain an artificial state or condition

of flowing water, by means of a dam, cannot change such state or condition to the injury of other riparian owners. So long as he claims a right to his easement, persons benefited by it have a right to have it continued in the established manner. *Smith* v. *Youmans*, 96 Wis. 103 (70 N. W. Rep. 1115; 65 Am. St. Rep. 30; 37 L. R. A. 285). Applying Wash. Laws 1863, p. 68, as amended by Code Proc., § 108, which provides that "the common law, so far as it is not repugnant to, or inconsistent with, the constitution and laws of the United States and the organic act and laws of Washington state, nor incompatible with the institutions and conditions of society in this state, shall be the rule of decision in all the courts of this state," it is held that the common law doctrine concerning riparian rights upon natural water courses prevails in that state and applies to its arid portion; and such existing rights are not destroyed by Laws 1873, p. 520, regulating irrigation and water rights in the county of Yakima, Washington Territory. *Benton* v. *Johncox*, 17 Wash. 277 (49 Pac. Rep. 495; 61 Am. St. Rep. 912; 39 L. R. A. 107). See opinion for exhaustive discussion of this subject.

Sec. 824. Riparian rights in navigable waters. Riparian owners on navigable waters hold their land subordinate to the public use of such waters, if such use is reasonably exercised, precisely as do the owners of land abutting on any other public highway. Such an owner may recover damages caused by the careless and negligent acts of a navigator. *Ducette* v. *Little Falls Imp. & Nav. Co.*, 71 Minn. 206 (73 N. W. Rep. 847). The title of adjoining owners to sub merged lands along navigable waters and the right of access thereto, are subject to the paramount right of the United States to use the land in such manner as it shall determine to be necessary in aid of navigation. *Scranton* v. *Wheeler*, 113 Mich. 565 (71 N. W. Rep. 1091). A riparian owner on navigable water has the right to construct, below high water mark bridges, piers, and landing places, if he conforms to the regulations of the state and does not interfere with the right of navigation. *Mills & Allen* v. *Evans*, 100 Ia. 712 (69 N. W. Rep. 1043). The erection of a dam on a river for irrigation purposes, several miles above the point where it is navi-

gable, will not be enjoined although it operates to decrease the volume of water which would otherwise flow into the navigable portion of the river. Act Cong. Sept. 19, 1890, construed and applied. *United States* v. *Rio Grande Dam & Irr. Co.*, N. M. (51 Pac. Rep. 674). Riparian owners upon tide lands have no right to construct wharfs, buildings and other improvements in front of their lands on the lands owned by the city, where it will obstruct and deflect the flow of water. *Murphy* v. *Bullock*, 20 R. I. 35 (37 Atl. Rep. 348). For the determination of riparian rights in a particular case by the construction of a deed made by the state of Rhode Island to the City of Providence in 1870, see *Murphy* v. *Bullock*, 20 R. I. 35 (37 Atl. Rep. 348). Ind. Laws 1899, p. 188, authorizes a riparian owner upon navigable waters of the state, within the width of his premises, to build, maintain and occupy piers, wharves, docks and harbors.

Sec. 825. Riparian rights in navigable waters—Rights of the public. The ownership of a riparian proprietor to the middle of a navigable river does not carry with it the right to the exclusive use of the water over land ordinarily covered by water, but is subordinate to the paramount easement of navigation by the public, which includes the right to use such water for navigation and commerce, and such use as may be reasonably incident thereto. Among the rights of the public is that of mooring vessels for the purpose of repairs, and of putting in engine, boilers and machinery, after such vessels have been launched. Such use, reasonably enjoyed, is not a trespass upon the lands of a riparian owner, in front of whose river bank, outside of the dock line, such vessels are moored, and such owner will not be entitled to an injunction forbidding such use useless special injury to his property is shown. But the right of the public does not extend to the use of the lands of the owner not covered by water. And where a builder of vessels so moored carries lines from them across the river bank of such riparian owner, against his objection, and fastens them upon the land of such builder, and insists upon the right to continue such acts, the riparian owner may be entitled to an injunction, although his land is unimproved, and such acts produce no actual present damage. *Pollock* v.

Cleveland Shipbuilding Co., 56 O. St. 655 (47 N. E. Rep. 582). While the general rule prevents any disturbance of riparian rights by public authority, past or present, without making compensation, when the interest of the whole people requires an improvement of the water front for the benefit of navigation and commerce it seems to have been the rule for the state, or the city of New York by permission of the state, to make such improvements upon the tide-water front for that purpose, without compensating the riparian proprietor, other than by giving him the preemptive right of purchase in case of a sale. As against the general public, through their official representatives, riparian owners have no right to prevent important public improvements upon tide water for the benefit of commerce. The principle upon which the rule rests, although sometimes foreshadowed, has not been clearly set forth. Although, as against individuals or the unorganized public, riparian owners have special rights to the tideway that are recognized and protected by law, as against the general public, as organized and represented by government, they have no rights that do not yield to commercial necessities, except the right of preemption, when conferred by the statute, and the right to wharfage when protected by a grant and covenant on the part of the state. *Sage* v. *Mayor of City of New York*, 154 N. Y. 61 (47 N. E. Rep. 1096; 61 St. Rep. 592, 38 L. R. A. 606).

Sec. 826. Riparian rights in navigable waters—Apportionment of flats and shore line. In the case of *Groner* v. *Foster*, 94 Va. 650 (27 S. E. Rep. 498), the supreme court of appeals of Virginia say: "Every riparian owner has the right to water frontage belonging by nature to his land. This right includes, among others, the right of access from the front of his land to the navigable part of the water course, and also the right to the soil under the water between his land and the navigable line of the water course, whereon he may erect wharves, piers or bulkheads for his own use or the use of the public, subject to such rules and regulations as the legislature may see proper to impose for the protection of the public. Gould, Waters, § 149; *Norfolk City* v. *Cook*, 27 Grat. 430; *Railway Co.* v. *Faunce*, 81 Grat. 761; *Dutton* v.

Strong, 1 Black 23; and *Yates* v. *Milwaukee*, 10 Wall. 497. In this state the enjoyment of the right is made subject by statute to the limitation that its exercise shall not result in the obstruction of navigation, nor in other injury to the private rights of any person. Code Va., § 998. Each riparian proprietor is entitled, in conformity to such right, to have the extent of its enjoyment upon the line of navigability of the water course determined and marked, and his proper share of the flats or land under the water for the purposes aforesaid set apart, and its boundaries defined. A court of equity has jurisdiction, and is the proper tribunal to make the apportionment, and to determine and establish the boundary lines of the coterminous owners. In making the apportionment, the prime object, upon plain principles of justice, should be to give to each proprietor of the shore, and as directly in his front as practicable, a parcel of the land under the water of a width at its outer end upon the line of navigability proportioned to that which it has at the inner or shore end. *Wonson* v. *Wonson*, 14 Allen 71; and Gould, Waters, §§ 162, 163. It is apparent upon the most cursory reflection, that this cannot be attained by a fixed rule of extending out to the line of navigability of the water course the divisional lines between the proprietors of the upland in the same direction that these lines reach the shore. The frequent curvature which generally characterizes the form of the shore forbids its adoption as a rule of division. It would only answer where the line of the shore was straight, the line of navigability equal in length and parallel with it, and the divisional lines approached the shore at right angles. Where the line of the shore of the line of navigability curves, either inwardly or outwardly, or the divisional lines of the uplands approach the shore at different angles, their projection in the same direction out to the line of navigability would necessarily, and unjustly, cause them to encroach upon the riparian rights of the several coterminous proprietors in the water frontage, and deprive some one or more of them of all access to, and benefit of, the navigable part of the water course. A just rule of division is to measure the length of the shore, and ascertain the portion thereof to which each riparian proprietor is entitled; next measure the length of navigability, and give to each proprietor the same

proportion of it that he is entitled to of the shore line; and then draw straight lines from the points of division so marked for each proprietor on the line of navigability to the extremities of the line on the shore. Each proprietor will be entitled to the portion of the line of navigability thus apportioned to him, and also to the portion of the flats or land under the water within the lines so drawn from the extremities of his portion of the said line to the extremities of his part of the shore. The general rule of division, therefore, is, as the whole shore line is to the whole line of navigability, so is each one's share of the shore line to each one's share of the line of navigability. The lines so drawn will be parallel or diverge or converge as the navigable water line happens to be equal and parallel with, or is longer or shorter than, the shore line. The rule stated above is that which has been adopted in apportioning riparian rights between coterminous owners in cases of a similar nature. It is the rule that was early adopted by the supreme court of Massachusetts in *Deerfield* v. *Arms*, 17 Pick. 41 (28 Am. Dec. 276), which was the case of an apportionment of a parcel of land formed by alluvial deposits on the margin and bed of Deerfield river, and has since not only been adhered to in that state, but has been followed by the supreme court of the United States, and by the highest courts of a number of states. *Johnston* v. *Jones*, 1 Black 222, 223; *O'Donnell* v. *Kelsey*, 10 N. Y. 412; *Batchelder* v. *Keniston*, 51 N. H. 496 (12 Am. Rep. 143); *Railroad Co.* v. *Hannon*, 37 N. J. L. 276; *Lumber Co.* v. *Peters*, 87 Mich. 498 (49 N. W. Rep. 917; 24 Am. St. Rep. 175); *Land Co.* v. *Bigelow*, 84 Wis. 157 (54 N. W. Rep. 496)." Va. Laws 1881–82, ch. 205; Laws 1883–84, ch. 148; Laws 1889–90, ch. 371; Code, §§ 1339, 2010, 2011, construed and applied—apportioning among riparian owners flats and shore line—port warden's line—low water mark as shore line. *Groner* v. *Foster*, 94 Va. 650 (27 S. E. Rep. 493).

Sec. 827. Title to and use of lakes. Under the Colonial Ordinance of 1641–47, great ponds and lakes belonged to the state and it may permit towns and cities to take water therefrom, for the domestic use of their inhabitants without being liable to pay damages to those who want the water for

the use of mills. The taking of a one-fifteenth part of the water supply of a pond having a daily capacity of 15,000,000 gallons for the use of a city is not an unreasonable use so as to give mill owners a right to complain. *City of Auburn* v. *Union Water-Power Co.*, 90 Me. 576 (38 Atl. Rep. 561; 38 L. R. A. 188). Title to and dominion over lands beneath the navigable waters of the great lakes are in the states respectively within whose boundaries such lands are located, each state holding the fee thereof in trust for the people for the purposes of navigation and fishing. Ill. Act June 4, 1889, authorizing board of park commissioners for Lincoln Park in the city of Chicago to extend its boulevard and driveway over and upon the bed of Lake Michigan, and sell and convey the submerged lands which might be reclaimed in extending the driveway in the lake, is held to be within the power of the legislature. See opinion for further construction of this statute. *People* v. *Kirk*, 162 Ill. 138 (45 N. E. Rep. 830; 58 Am. St. Rep. 277). Ownership to the water line of a meandered lake owned by the state, gives no exclusive right to hunt or fish on the surface of such lake. *Ne-Pee Nauk Club* v. *Wilson*, 96 Wis. 290 (71 N. W. Rep. 661). It is held that an island lying in Lake Huron, Michigan, 600 feet from the shore, does not belong to the owner of the main land on the shore. *Sherwood* v. *Com'r of State Land Office*, 113 Mich. 227 (71 N. W. Rep. 532). Riparian owners upon a lake, the title to which is in the state, each have the right to construct in front of his land in shallow water proper wharves, piers, and booms in aid of navigation without obstructing it far enough to reach water actually navigable for such boats as are in use or appropriate to the lake. *City of Madison* v. *Mayers*, 97 Wis. 399 (73 N. W. Rep. 43; 65 Am. St. Rep. 127; 40 L. R. A. 635)

Sec. 828. Right of riparian owners to accretions. New land formed by accretion on account of natural changes in a river belongs to the owner of the land to which it becomes attached. *Price* v. *Hallett*, 138 Mo. 561 (38 S. W. Rep. 451). Land separated from the main land on one side of a river by reason of a sudden change in its channel, and left connected with the land on the other side in such manner as to be capable of identification, is not an accretion. *Coulthard*

v. *Davis*, 101 Ia. 625 (70 N. W. Rep. 716). Lands made by filling up a water front and constructing piers in a municipal improvement of the water front for the benefit of navigation do not constitute an accretion to the land of a riparian proprietor, but remain the property of the city for the benefit of the public as dry land just the same as when it was land under water. *Sage* v. *City of New York*, 154 N. Y. 61 (47 N. E. Rep. 1096; 61 Am. St. Rep. 592; 38 L. R. A. 606). Riparian owners of land bordering on non-navigable lakes, meandered by the government surveyors in 1851 and 1852, which never became wholly dry and their entire beds fit for cultivation until 1890 or 1891, are not entitled to the bed of the lake under the law of accretion; and the rule that a riparian owner of land bordering on rivers or streams, in the absence of limitations in his title, takes to the center thread of the stream, does not apply in Iowa to the case of a lake or pond. *Noyes* v. *Board of Sup'rs.*, 104 Ia. 174 (73 N. W. Rep. 480). Particular addition to land held not to create an accretion. *Bennett* v. *National Starch Mfg. Co.*, 103 Ia. 207 (72 N. W. Rep. 507). Md. Laws 1894, ch. 380, § 46, 47, construed—title to oyster beds—jurisdiction of equity. *Powell* v. *Wilson*, 85 Md. 347 (37 Atl. Rep. 216). For further construction of this statute, see *Handy* v. *Maddox*, 85 Md. 547 (37 Atl. Rep. 222). Va. Code, § 2137, construed and applied—applications for assignment of oyster planting grounds. *West* v. *Adams*, Va. (27 S. E. Rep. 496). Mo. Laws 1895, act Apr. 8, 1895—grant of accretions and island formations to counties—amended, Laws 1899, p. 276.

Sec. 829. Obstruction or diversion of water course. A riparian owner has a right to build barriers and confine the waters to the channel of the stream, but he cannot build and maintain a structure which would change the channel or project the waters against or upon the property of others in such a way as will result in substantial injury to such property. *Parker* v. *City of Atchison*, 58 Kan. 29 (48 Pac. Rep. 681). Where logs floated on a stream are carried upon the land of another by the wrongful erection of a dam by the owner of the logs he is liable for damages although he does not claim the logs. *Kentucky Lumber Co.* v. *Miracle*, Ky. (41

S. W. Rep. 25). A court of equity has jurisdiction to grant relief against the obstruction of a water course, by a dam built by a nonresident so as to work an injury to a resident owner of adjoining land. *Gordon* v. *Warfield*, 74 Miss. 558 (21 So. Rep. 151). Where injuries resulting from one's obstruction of a water course are such as might be reasonably expected to result, he cannot escape liability by showing that they have been augmented by the negligence of third persons. *Babbitt* v. *Safety Fund Nat. Bank*, 169 Mass. 861 (47 N. E. Rep. 1018). In constructing its right of way across a stream, a railroad does not discharge its duty under Ind. Rev. Stat. 1894, § 5153, subd. 5, by constructing it in a sufficient manner to protect its own interests, but it is bound to take into consideration the nature of the stream and leave sufficient openings under its bridges to permit the free passage of water which would naturally accumulate within ordinary high water mark. *New York, C. & St. L. R. Co.* v. *Hamlet Hay Co.*, 149 Ind. 344 (47 N. E. Rep. 1060). A railroad company is liable for obstructing a water course by the negligent construction of its road bed. *Chicago B. & Q. R. Co.* v. *Emmert*, 53 Neb. 287 (73 N. W. Rep. 540); *Brown* v. *Pine Creek Ry. Co.*, 183 Pa. St. 88 (38 Atl. Rep. 401); *Illinois Cent. R. Co.* v. *Wilbourn*, 74 Miss. 284 (21 So. Rep. 1). Where, in such a case, the injury is to crops and lands, the measure of damages is the fair value of the crops at the time of their destruction, and the difference in the fair value of the real estate immediately before and immediately after the injury. *Chicago, B. & Q. R. Co.* v. *Emmert*, 53 Neb. 287 (73 N. W. Rep. 540). For particular fact case illustrating the liability of a municipal corporation for the obstruction of a water course, see *Taubert* v. *City of St. Paul*, 68 Minn. 519 (71 N. W. Rep. 664). A statute (Pa. Pub. Laws 1891, p. 210) which gives a borough power to widen and deepen within its limits the channel of a stream, gives it the right to prevent by proper legal proceedings acts of others which will interfere with the exercise of this power. *Borough of Tyrone* v. *Stevens*, 178 Pa. St. 543 (36 Atl. Rep. 166).

The right of a riparian owner to divert water for his own use is confined to his riparian lands and he cannot confer upon another person the right to divert water from a stream to use on

nonriparian lands to the injury of a lower proprietor. *Gould* v. *Eaton*, 117 Cal. 539 (49 Pac. Rep. 577; 38 L. R. A. 181). In an action for the wrongful diversion of water which operated to interrupt the plaintiff's business, evidence of the nature and extent of his business and the general rate of profit he has realized therefrom may be considered by the jury in estimating the damages. *East Jersey Water Co.* v. *Bigelow*, 60 N. J. L. 201 (38 Atl. Rep. 681). The fact that headgates regulating the flow of water in which several riparian owners are interested have been controlled by an upper owner and his predecessors in title, does not give him a prescriptive right to make a diversion of water not necessary for his own use, which operates to deprive the lower owners of any use of it. *Hughesville Water Co.* v. *Person*, 182 Pa. St. 450 (38 Atl. Rep. 584). A waterworks company diverting water to the injury of a riparian owner may be held liable for damages; and where in such case the injury is not permanent, damages actually accrued before action brought can be recovered, and any further damages must be recovered in a separate action when they actually accrue, and the statute runs from the time the special damage complained of occurred. *Valparaiso City Water Co.* v. *Dickover*, 17 Ind. App. 283 (46 N. E. Rep. 591). It is an actionable nuisance for one, by means of a reservoir, to increase, divert, or diminish the volume of water naturally flowing in a stream, to the detriment of and damage to a mill owner thereon; and it is no defense to the action for such an injury that the person complaining is benefited by the increase in the volume of water, for he has the right to the enjoyment of the waters in their natural condition; or if the plaintiff be injured by the diversion or diminution of the usual flow at certain periods, this injury cannot be compensated, without the consent of the plaintiff, by an increased volume caused by the defendant, in excess of the natural flow, at another time, and no credit could be given, or diminution of actual damage made, because of the benefit received by the plaintiff by reason of such increased volume. *East Jersey Water Co.* v. *Bigelow*, 60 N. J. L. 201 (38 Atl. Rep. 681). Where the diversion of water interferes with a riparian owner's use of his land as a pleasure resort, the measure of damages is the difference in the rental value of the

property while the diversion continues. *Valparaiso City Water Co.* v. *Dickover*, 17 Ind. App. 233 (46 N. E. Rep. 591). A riparian owner has no right to have the sewage of a city turned into the stream above his mill instead of being diverted elsewhere, although from one-third to one-half of the stream has been taken by the city without right and has entered the sewerage system; but the disposal of the sewage is under the control of the city, and the remedy of the riparian owner for wrongfully taking the water is by action for damages or by injunction. *Fisk* v. *City of Hartford*, 69 Conn. 375 (37 Atl. Rep. 988; 38 L. R. A. 474).

Sec. 830. Pollution of waters—Discharge of city sewage. Where one operating a mine discharges tailings therefrom into a stream, he is liable for damages occasioned thereby to a lower owner. *Threatt* v. *Brewer Min. Co.*, 49 S. C. 95 (26 S. E. Rep. 970). A nonriparian mine owner may not artificially cause the injurious discoloration of a natural water course by water from his mine, if, by the use of practicable means within his knowledge, he may carry on his mining operations without injury to the rights of others. *Sterling Iron & Zinc Co.* v. *Sparks Mfg. Co.*, N. J. L. (38 Atl. Rep. 426). Permitting water supplied by an artisian well upon one's own premises after having been used for bathing diseased patients in a sanitarium located thereon, to flow into a stream forming a natural drain for such land, does not render the owner liable for damages to an adjoining owner, where there is no negligence or malice and all due care has been used to avoid injury. *Barnard* v. *Shirley*, 151 Ind. 160 (47 N. E. Rep. 671; 41 L. R. A. 737). If a municipal corporation, in the absence of a legal right so to do, causes sewage to pollute a water course, to the use of which a lower owner, through whose premises the water course flows, is entitled, it is guilty of a nuisance, for which damages may be recovered. *Nolan* v. *City of New Britain*, 69 Conn. 668 (38 Atl. Rep. 703). Citing, *Inman* v. *Tripp*, 11 R. I. 520 (23 Am. Rep. 520); *New York Cent. & H. R. R. Co.* v. *City of Rochester*, 127 N. Y. 591 (28 N. E. Rep. 416); *Attorney General* v. *Leeds Corp.*, 5 Ch. App. 583; Gould, Waters, § 545; Dill. Mun. Corp. (4th Ed.) 1047;

Byrnes v. *City of Cohoes*, 67 N. Y. 204 *Seifert* v. *City of Brooklyn*, 101 N. Y. 136 (4 N. E. Rep. 321; 54 Am. Rep. 664); *Franklin Wharf Co.* v. *City of Portland*, 67 Me. 48 (24 Am. Rep. 1); *Morse* v. *City of Worcester*, 139 Mass. 389 (2 N. E. Rep. 694). In Indiana it is held that a city, discharging its sewage through a system of sewers, properly constructed and used, into a water course forming a natural drainage for the land upon which it is situated, is not liable for injury to a riparian owner on account of the pollution of the water. *City of Richmond* v. *Test*, 18 Ind. App. 482 (48 N. E. Rep. 610). But in California and Pennsylvania it is held that if a city by its use of a stream for an outlet for its sewage so obstructs or pollutes it as to damage the property of a riparian owner he may have his remedy in an action for damages or an injunction against such use. *Peterson* v. *City of Santa Rosa*, 119 Cal. 387 (51 Pac. Rep. 557); *Owens* v. *City of Lancaster*, 182 Pa. St. 257 (37 Atl. Rep. 858).

SPECIFIC PERFORMANCE.

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Sec. 831. As to the right of specific performance. Specific performance is not a matter of strict right but rests in the sound discretion of the court. *Dewey* v. *Spring Valley Land Co.*, 98 Wis. 83 (73 N. W. Rep. 565). While specific peformance is a matter of discretion, where the contract relating to land is not objectionable, legally it is as much a matter of course for a court of equity to decree specific performance as it is for a court of law to give damages for a breach thereof. *Stamper* v. *Stamper*, 121 N. C. 251 (28 S. E. Rep. 20). An obvious limitation on the power to compel specific performance arises when the act required to be performed is beyond the ability of the defendant. *Caperton* v. *Forrey*, 49 La. 872 (21 So. Rep. 600).

Sec. 832. As to what contracts may be specifically enforced—Particular cases. Contracts procured by fraud or misrepresentations cannot be specifically enforced. *Crane*

v. *Judik*, 86 Md. 68 (38 Atl. Rep. 129). Where an option to purchase real estate given without consideration, is withdrawn before acceptance, it cannot be specifically enforced either by the one to whom it was given or his assignee after its withdrawal. *Crandall* v. *Willig*, 166 Ill. 288 (46 N. E. Rep. 755). A contract between corporations will not be specifically enforced where the making of the alleged agreement is in doubt and it does not appear that the parties executing it were authorized to do so. *Dewey* v. *Spring Valley Land Co.*, 98 Wis. 88 (73 N. W. Rep. 565). An agreement to pay a divorced wife a certain amount of alimony quarterly till she die or remarry, secured by a deed of trust, may be specifically enforced. *Fleming* v. *Peterson*, 167 Ill. 465 (47 N. E. Rep. 755). A contract in the nature of a family settlement, will be specifically enforced where it is based upon a sufficient consideration, has been accepted and acted upon by the parties, and its anullment would entail upon the parties seeking to hold it, an irreparable loss. *Mooney* v. *Rowland*, 64 Ark. 19 (40 S. W. Rep. 259). The failure of a party to perform a condition in a contract at the time specified therein, although time is made of the essence of the contract, will not necessarily defeat his right to specific performance if the condition be subsequently performed without unreasonable delay and no circumstances have intervened that would render it inequitable or unjust to give such relief. *Shouse* v. *Doane*, 39 Fla. 95 (21 So. Rep. 807). Where one agrees with a purchaser of land for speculative purposes to guarantee to him the realization of a certain sum within a given time in consideration of a half interest in the additional profits, specific performance of such a contract will not be decreed where performance was not demanded at the expiration of such time and the parties, by mutual consent, waited for several years hoping to gain an advantage thereby, during which time the land greatly depreciated. *Brown* v. *Massey*, 138 Mo. 519 (38 S. W. Rep. 939). The provision in a lease, obligating the lessor to pay a fair price for a building to be erected by the tenant upon the termination of the lease, may be specifically enforced by the lessee. *Duffy* v. *Kelly*, 55 N. J. Eq. 627 (37 Atl. Rep. 597). A stipulation in a lease providing for the determination of the rent to be paid, at cer-

tain intervals, by appraisers, being in the nature of an agreement to arbitrate, cannot be specifically enforced, but a court of equity may make the appraisement. *Grosvenor* v. *Flint*, 20 R. I. 21 (37 Atl. Rep. 304). Particular facts held to entitle one to an accounting and specific performance. *Hege* v. *Thorsgaard*, 98 Wis. 11 (73 N. W. Rep. 567). For particular cases in which the right of specific performance is upheld, see *Palmer* v. *Palmer*, 114 Mich. 509 (72 N. W. Rep. 322); *Plummer* v. *Kelly*, 7 N. Dak. 88 (73 N. W. Rep. 70). For particular cases in which the right to specific performance was denied, see *Helton* v. *Johnson*, Va. (27 S. E. Rep. 579); *Prentiss* v. *Nelson*, 69 Minn. 496 (72 N. W. Rep. 831); *Howlett* v. *Howlett*, 115 Mich. 75 (72 N. W. Rep. 1100).

Sec. 833. Contracts to convey land. A contract to convey land to one in consideration of his performing personal service, may be enforced by him after he has performed the service. *Thurber* v. *Meves*, 119 Cal. 85 (50 Pac. Rep. 1068). Specific performance of a contract to convey land will not be decreed where it appears by the terms of the contract that the plaintiff's right to a conveyance was dependent upon a contingency which never happened. *Glidden* v. *Korter*, 90 Me. 269 (38 Atl. Rep. 159). Specific performance cannot be enforced against one who contracts to convey land in case his wife is willing to join in the deed, where she refuses to do so. *Venator* v. *Swenson*, 100 Ia. 295 (69 N. W. Rep. 522). Where a large part of the property or a large interest in the property cannot be conveyed, the court will not decree a specific performance as to any of it, but will leave the parties to their remedy at law. *Corby* v. *Drew*, 55 N. J. Eq. 387 (36 Atl. Rep. 827). The right of a vendee to compel a conveyance of the legal title from a vendor is not affected by the fact that such vendee has acquired title by adverse possession. *Clemons* v. *Cox*, 114 Ala. 350 (21 So. Rep. 426). A vendor's right to have specific performance of a contract of sale is not affected by the fact that he did not have title at the time the contract was made, where he explained the nature of his interest to the satisfaction of his vendee and acquired title before the commencement of the action to enforce the contract. *William-*

son v. *Neeves*, 94 Wis. 656 (69 N. W. Rep. 806). Where a party to a contract for the exchange of lands foot for foot, by mistake conveyed less than he received, it is held that the other party was entitled to specific performance upon discovery of the mistake, although the value of the land had materially changed. *Max Meadows Land & Imp. Co.* v. *Bridges*, 95 Va. 184 (27 S. E. Rep. 839). Where time is not the essence of the contract, a vendor who is unable to make title at the time he should convey, may have specific performance by tendering good title at any time before decree, in an action brought by his vendee to recover money paid under the contract, and where such vendor's contract was not speculative but entered into in good faith, and when the situation of the vendee has not been altered so as to render specific performance unjust to him. In such case the awarding of rents to the vendee together with costs, in the absence of special circumstances, adjusts the equities. *Seaver* v. *Hall*, 50 Neb. 878 (70 N. W. Rep. 373). Where it appears that a vendor is innocently ignorant of the fact that his record title does not carry all the property embraced in the contract of sale, and the vendee does not deny that he had knowledge of such defect, he will not be entitled to a decree compelling the vendor to convey the deficiency. *Planer* v. *Equitable Life Assur. Soc.*, N. J. Eq. (37 Atl. Rep. 668).

Sec. 834. Antenuptial contracts. A court of equity has jurisdiction to decree specific performance of an antenuptial contract. *Thompson* v. *Tucker-Osborn*, 111 Mich. 470 (69 N. W. Rep. 730). The court say: "A marriage between parties who have previously made a contract with each other, to be performed presently or during the marriage, releases or extinguishes such contract. Such contracts, however, made when in contemplation of marriage, and respecting the property of each of the parties, though released or extingnished at law, are held good in equity, and will be enforced by a court of chancery against the heirs of the party in default. *Miller* v. *Goodwin*, 8 Gray 542. As stated by Mr. Schouler in his work on Domestic Relations (§ 173): 'In this country the validity of marriage settlements is generally recognized; and it is well understood that almost any

bona fide and reasonable agreement made before marriage, securing the wife either in the enjoyment of her own personal property or a portion of that of her husband, either in coverture or after death, will be enforced in a court of chancery.' In *Stillcy* v. *Folger*, 14 Ohio 610, the court said: 'All supposed actual fraud may be laid out of view. Why should not this agreement be enforced? Antenuptial contracts have long been regarded as within the policy of the law, both in Westminster and the United States. They are in favor of marriage, and tend to promote domestic happiness, by removing one of the frequent causes of family dispute,—contention about property, and especially allowances to the wife. Indeed, we think it may be considered as well settled at this day that almost any *bona fide* and reasonable agreement made before marriage to secure the wife the enjoyment either of her own separate property or a portion of that of her husband, whether during the coverture or after death, will be carried into execution in a court of chancery.' In *Paine* v. *Hollister*, 139 Mass. 144 (29 N. E. Rep. 541), a bill was filed by the executor to enjoin the widow prosecuting a petition in the probate court for an allowance out of the husband's estate, setting up the fact that the defendant had entered into an antenuptial contract whereby she had agreed to accept a certain provision in lieu of dower, or an allowance or distributive share in the estate of her husband. There the court said: 'There is no doubt that the contract is lawful in its general features; that it was not extinguished by the marriage of the parties; and that a resort to equity is proper to enforce it.' The same principle is recognized in equity in *Tarbell* v. *Tarbell*, 10 Allen 278; *Jenkins* v. *Holt*, 109 Mass. 261; *Blackington* v. *Blackington*, 110 Mass. 461; *Sullings* v. *Richmond*, 5 Allen 187 (81 Am. Dec. 742); *Collins* v. *Collins*, 72 Ia. 104 (33 N. W. Rep. 442); *McNutt* v. *McNutt*, 116 Ind. 545 (19 N. E. Rep. 115; 2 L. R. A. 372). In a note to the last case cited it is said, 'Executory agreements made between a man and woman, who afterwards marry, and which then become void at the common law, in the application of the conscientious principles of equity, will be specifically enforced against either husband or wife at the suit of

the other.' This doctrine has been fully recognized in this court in *Phillips* v. *Phillips*, 88 Mich. 259 (47 N. W. Rep. 110)."

Sec. 835. Married woman's contracts. Although § 5 of the married woman's act of New Jersey, 1874, provides that the contracts of a married woman "shall be legal and obligatory and may be enforced at law or in equity," it is held, construing this section in connection with § 9, which requires a married woman's acknowledgment of her deed to show a "private examination apart from her husband before the officer, and that she signed, sealed and delivered the same as her voluntary act and deed, freely, without any threats or compulsion of her husband," that her contract to convey her land will not be specifically enforced by a court of equity unless it is executed with all the formalities required for a deed by her. *Corby* v. *Drew*, 55 N. J. Eq. 887 (36 Atl. Rep. 827).

Sec. 836. Diligence required of party seeking. Diligence is required of one seeking equitable relief, such as specific performance of a contract, for if, through unnecessary and unexplained delay, the value of the property involved has greatly increased, or the circumstances have changed, so that an injustice will be done to allow such equitable relief, it will not be granted. So, if a party seeking relief has failed to assert his claim, and has permitted others to go into possession, and in any manner greatly increase or add to the value of the property, while he has stood by in silence, he must be deemed to have waived and lost his equitable interests. And he may also waive and lose these rights by abandonment. *Anderson* v. *Luther Min. Co.*, 70 Minn. 28 (72 N. W. Rep. 820). The right to have specific performance for the exchange of land is not lost by mere delay, where the situation of the parties is not changed and nothing has been lost by the delay. *Fisher* v. *Carroll Co. Fair & Driv. Park Ass'n*, 108 Ia. 745 (72 N. W. Rep. 684).

Sec. 837. Demand and tender. Where a defendant has put it out of his power to comply with his contract, a demand or tender by the plaintiff is not required. *Auxier* v.

Taylor, 102 Ia. 678 (72 N. W. Rep. 291). Where a vendor is seeking to enforce a forfeiture, a vendee may ask for specific performance by a cross bill without previous tender of the purchase money, an offer of payment in his pleading being sufficient. *Mc Whirter* v. *Crawford*, 104 Ia. 550 (72 N. W. Rep. 505). A party seeking to enforce specific performance must show a full and complete performance on his part. *Bamberger* v. *Johnson*, 86 Md. 88 (37 Atl. Rep. 900). Where a contract for the purchase of lands provides for the construction of a certain ditch affecting the land, the expense of which is to be borne equally by the parties, it is held that the vendee seeking a specific performance of the contract must tender the entire purchase price and not the amount of the purchase price less one-half of the expense he has incurred in the construction of the ditch. *Bidwell* v. *Garrison*, N. J. Eq. (36 Atl. Rep. 941). Where a lease gives the lessee an option to purchase the premises upon giving a certain notice and paying $6,000 cash and giving a mortgage note for $10,000 due in one year with interest, such lessee may have specific performance of the contract by giving the required notice and tendering the whole amount in cash with interest on the $10,000 for one year. *Zimmerman* v. *Brown*, N. J. Eq. (36 Atl. Rep. 675). Where the payment of the last installment of the purchase money by the vendee and the conveyance of the title by the vendor are concurrent and dependent acts, the vendee, before he can maintain a bill for specific performance against the vendor, must pay or tender the purchase money in full; but a "tender of purchase money" in such a case, does not mean a tender strictly valid at law, but means a present readiness, willingness, and ability in good faith to perform the acts required of one by the agreement, provided the other party will concurrently do the things which he is required by the contract to do, and notice by the former to the latter of such readiness, willingness, and ability. *Shouse* v. *Doane*, 39 Fla. 95 (21 So. Rep. 807). Citing, *Smith* v. *Lewis*, 26 Conn. 110; *Clark* v. *Weis*, 87 Ill. 438 (29 Am. Rep. 60).

Sec. 838. Parties, pleading and practice. A suit to compel the specific performance of a contract falls under the exclusive jurisdiction of equity, regardless of the absence or

inadequacy of the legal remedy. *Hammond* v. *Foreman*, 48 S. C. 175 (26 S. E. Rep. 212). The contract sought to be enforced must be fully and clearly proved in all its parts. *Dewey* v. *Spring Valley Land Co.*, 98 Wis. 83 (73 N. W. Rep. 565). Particular complaint in an action for specific performance held sufficient. *Oliver Min. Co.* v. *Clark*, 69 Minn. 75 (71 N. W. Rep. 908). Particular bill to enforce performance of a contract to buy land and to foreclose a vendor's lien, held not multifarious. *Proctor* v. *Plumer*, 112 Mich. 398 (70 N. W. Rep. 1028). S. Dak. Comp. Laws, § 4927, construed and applied—pleading performance of conditions precedent—particular complaint held sufficient. *De Ford* v. *Hyde*, 10 S. Dak. 386 (73 N. W. Rep. 265). Where a defendant permits a contract required to be in writing to be proved by parol, he waives the defense of the statute of frauds. *Pike* v. *Pike*, 69 Vt. 535 (38 Atl. Rep. 265). A vendor, defending against an action for specific performance, cannot for the first time raise the objection on appeal that the land to be conveyed was a homestead and his wife did not join in the contract. *Wilson* v. *Riddick*, 100 Ia. 697 (69 N. W. Rep. 1039). Upon the death of a vendor seeking specific performance by a cross bill, in an action brought by his vendee to recover earnest money paid, it is proper to substitute his executors as parties and they may dismiss the bill although the vendor's devisees are not parties. *Scott* v. *Davis*, 141 Mo. 213 (42 S. W. Rep. 714). Where a vendee asking for specific performance and general relief is barred as to the former on account of the statute of frauds, he may enforce a lien on the land for partial payments of the purchase money which he has made. *Devore* v. *Devore*, 138 Mo. 181 (39 S. W. Rep. 68). Where a vendor is entitled to specific performance, it is proper to render a decree that, on the vendee's default in payment of the price that the premises be sold and judgment entered against him for any deficiency. *Loveridge* v. *Shurtz*, 111 Mich. 618 (70 N. W. Rep. 132). Where both parties to the action are insisting upon specific performance but one raises objections as to the title of the other, which are subsequently withdrawn, it is then too late for the other to refuse performance as a matter of right. *Kahn* v. *Chapin*, 152 N. Y. 305 (46 N. E. Rep. 489). Where a conveyance of land

has been specifically decreed interest may be allowed on the purchase price from the time of the decree to the completion of the transaction, the purchaser having possession but refusing to pay, pending an action concerning the land but not affecting the vendor's right to the price. *In re Blair's Estate*, 178 Pa. St. 582 (36 Atl. Rep. 179). See Ballards' Law Real Prop., Vol. V, § 809. A deed made in pursuance of a decree of specific performance of a contract of a deceased person, should be recognized by the proper court, although made after the time given for its execution by the decree, where injustice would result by a refusal to do so. *In re Blair's Estate*, 178 Pa. St. 582 (36 Atl. Rep. 179). Pa. Laws 1899, p. 157, authorizes the Orphans' courts to decree specific performance of certain contracts in case of death of vendor or vendee. A purchaser who has been guilty of such default as to authorize a forfeiture of all his rights under his contract, cannot enforce specific performance of the same without proof of waiver of forfeiture by the vendor. *Foot* v. *Bush*, 100 Ia. 522 (69 N. W. Rep. 874). Specific performance of a contract to convey land worth $3,000.00 for $2,875.00 will not be refused on the ground of inadequacy of price. *Ketcham* v. *Owen*, 55 N. J. Eq. 344 (36 Atl. Rep. 1095).

STARTING FIRES.

EPITOME OF CASES.

Sec. 839. Destruction of insured property—Rights of parties. An insurance company who has paid a loss on a building destroyed by fire negligently started by another, may join with the owner in an action against such party for his negligence, though they seek to recover not only the value of the building in excess of the policy, but damages to the owner's business proximately caused by defendant's negligence. *Fairbanks* v. *San Francisco & N. P. Ry. Co.*, 115 Cal. 579 (47 Pac. Rep. 450). Citing, *Swarthout* v. *Railway Co.*, 49 Wis. 625 (6 N. W. Rep. 314); *Crandall* v. *Transportation Co.*, 16 Fed. Rep. 75; *Home Mut. Ins. Co.* v. *Oregon R. Nav. Co.*,

20 Or. 569 (26 Pac. Rep. 857; 23 Am. St. Rep. 151). Where property partially insured was destroyed by the negligence of a railroad company and the insurer paid to the insured the amount of the policy and took from him an assignment of his cause of action against the railroad to the extent of the insurance paid, the right of the insurer to recover from the railroad the amount of the insurance paid is not affected by any judgment rendered in an action between the insured and the railroad company, although the insurer had knowledge of its pendency. *Omaha & R. V. Ry. Co.* v. *Granite State Fire Ins. Co.*, 53 Neb. 514 (73 N. W. Rep. 950). Me. Stat. 1895, ch. 79, whereby Rev. Stat. ch. 51, § 64, was so amended that the liability of railroad corporations in case of injury to property by fire communicated from a locomotive engine in the use of the corporation was limited to the excess of the injury suffered by the property owner over the net amount of insurance recovered, if received before damages are assessed, and which provides that if the insurance is not recovered before the damages are assessed the policy shall be assigned to the railroad corporation, which may maintain an action thereon, or prosecute an action already commenced by the insured, with all the rights which the insured originally had, is constitutional and applies to a policy of insurance existing on the property before the passage of the statute. *Leavitt* v. *Canadian Pac. Ry. Co.*, 90 Me. 153 (37 Atl. Rep. 886; 38 L. R. A. 152).

Sec. 840. Contributory negligence. The plaintiff must show by a fair preponderance of the evidence, that defendant was negligent, and that he himself was free from any negligence approximately contributing to the injury. *Miller* v. *Miller*, 17 Ind. App. 605 (47 N. E. Rep. 338); *Chiagco & E. R. Co.* v. *Bailey*, 19 Ind. App. 163 (46 N. E. Rep. 688). In Indiana it is held that the burden is upon the plaintiff, to show his want of contributory negligence. *Wabash R. Co.* v. *Miller*, 18 Ind. App. 549 (48 N. E. Rep. 663); *Louisville, N. A. & C. Ry. Co.* v. *Carmon*, 20 Ind. App. 471 (48 N. E. Rep. 1047; 50 N. E. Rep. 893). The owner of a house roofed with shingles sixty feet distant from a railroad, is not guilty of contributory regligence in allowing falling leaves to accumulate on its roof, on account of which fire was started. *Louis-*

ville & N. R. Co. v. *Malone*, 116 Ala. 600 (22 So. Rep. 897). Particular evidence held sufficient to authorize the submission of the question of contributory negligence to the jury. *Richmond* v. *McNeill*, 31 Or. 342 (49 Pac. Rep. 879). Particular special finding of facts held insufficient to show that plaintiff was free from contributory negligence. *Louisville, N. A. & C. Ry. Co.* v. *Roberts*, 18 Ind. App. 538 (47 N. E. Rep. 339); *Cameron* v. *Oberlin*, 19 Ind. App. 142 (48 N. E. Rep. 886); *Wabash R. Co.* v. *Miller*, 18 Ind. App. 549 (48 N. E. Rep. 663); *Louisville, N. A. & C. Ry. Co.* v. *Carmon*, 20 Ind. App. 471 (48 N. E. Rep. 1047; 50 N. E. Rep. 893).

Sec. 841. Liability of railroads for fires—Negligence. A railroad company which places on its side track cars owned and used by one having a contract to supply it with wood, does not thereby become liable for injuries resulting from fire kept by the contractor in one of the cars used for cooking purposes. *Leavitt* v. *Bangor & A. R. Co.*, 89 Me. 509 (36 Atl. Rep. 998; 36 L. R. A. 382). In Nebraska it is held that, when fire is set out by sparks from a passing locomotive, negligence may be inferred, and the burden of proof is upon the company to establish that the locomotive was not faulty in construction and was properly equipped and operated. *Rogers* v. *Kansas City & O. R. Co.*, 52 Neb. 86 (71 N. W. Rep. 977). The same is held in Virginia. *Kimball* v. *Borden*, 95 Va. 208 (28 S. E. Rep. 207). The rule that negligence is presumed from the mere fact that an engine set out a fire is a rule of evidence, and is therefore unaffected by the allegations of the complaint. If the plaintiff narrows his averment to a charge of negligence in the operation of the engine, he can still make out a *prima facie* case by showing that the engine did in fact set the fire. But, so long as the pleading remains unamended, the plaintiff can recover only for the negligence specified; and the defendant is not required to rebut any other presumption of negligence as it would be under a complaint charging negligence generally. *Mathews* v. *Great Northern Ry. Co.*, 7 N. Dak. 81 (72 N. W. Rep. 1085). Proof that a railroad company permitted inflammable material to accumulate upon its right of way which was discovered to be on fire within a few minutes after the passing of one of

its trains, is sufficient to raise the presumption that the fire was started by the negligence of the company. *Richmond* v. *McNeill*, 31 Or. 342 (49 Pac. Rep. 879). Where a railroad company negligently permits combustibles to accummulate on its right of way which are set on fire by sparks from an engine, it cannot escape liability by showing its exercise of all proper precautions to prevent escape of sparks from its engines. *Chicago & E. R. Co.* v. *Bailey*, 19 Ind. App. 168 (46 N. E. Rep. 688). The origin of a fire being fixed upon a railroad company, it is presumptively charged with negligence and must assume the burden of proving that it had used the proper precautions for confining sparks and cinders. *Patteson* v. *Chesapeake & O. R. Co.*, 94 Va. 16 (26 S. E. Rep. 393). Where a statute (N. J. Gen. Stat., Vol. 2, p. 2668) recognizing the right of railroad companies to use fire in the propelling of their trains, enacts certain regulations in respect to the precaution to be taken to prevent the escape of fire from the smokestacks of their engines, it is held that such legislative regulations define and limit the duty of the companies in respect to the precautions required against such escape of fire. *West Jersey R. Co.* v. *Abbott*, 60 N. J. L. 150 (37 Atl. Rep. 1104). A special verdict must state facts from which a conclusion of negligence can be drawn. *Luhr* v. *Michigan Cent. R. Co.*, 16 Ind. App. 562 (45 N. E. Rep. 796). Particular facts held insufficient to show that a fire destroying a building originated by a spark from a passing locomotive. *Lake Erie & W. R. Co.* v. *Naron*, 18 Ind. App. 193 (47 N. E. Rep. 691).

Sec. 842. Liability of railroads for fires—Action against receiver. Construing and applying Mass. Pub. Stat., ch. 112, § 214, providing that "every railroad corporation and street railway company shall be responsible in damages to a person or corporation whose buildings or other property may be injured by fire communicated by its locomotive engines, and shall have an insurable interest in the property upon its route for which it may be so held responsible, and may procure insurance thereon in its own behalf," it is held that the statute is remedial and must be construed liberally; and an action under it may be maintained against a receiver of an

operating railroad. *Wall* v. *Platt*, 169 Mass. 398 (48 N. E. Rep. 270). See opinion for collation of numerous authorities.

Sec. 843. Actions for injuries by fire—Complaint. A complaint, in an action for the negligent destruction by fire, of fruit trees, bushes and vines, sufficiently alleges that they were a part of the freehold and added to the value of the land, by alleging that they were growing and standing upon it at the time they were destroyed. *Missouri, K. & T. Ry. Co.* v. *Lycan*, 57 Kan. 635 (47 Pac. Rep. 526). A complaint alleging the destruction of property by fire which a railroad company negligently permitted to originate on its right of way and negligently permitted to escape upon plaintiff's land, is sufficient. *Chicago & E. R. Co.* v. *Long*, 16 Ind. App. 401 (45 N. E. Rep. 484). Allegations of particular complaint for injury by fire held sufficient to show the defendant was guilty of negligence and not of a willful tort. *Miller* v. *Miller*, 17 Ind. App. 605 (47 N. E. Rep. 338). A complaint which alleges the negligent accumulation of combustible matter upon the defendant's right of way, which was set on fire by the negligent emission of sparks from its locomotives, which fire was negligently permitted to spread to and destroy plaintiff's property without negligence on his part, is sufficient. *Chicago & S. E. Ry. Co.* v. *Daily*, 18 Ind. App. 808 (47 N. E. Rep. 1078). On a complaint for damages resulting to two tracts of land "contiguous and next adjoining" the defendant's premises, a recovery may be had where the proof shows that the two tracts referred to formed one continuous close, and in any point were contiguous or next adjoining the defendant's premises. A public road running through and within said tracts would not make them separate and distinct. *Dolby* v. *Hearn*, 1 Marv. (Del.) 158 (37 Atl. Rep. 45).

Sec. 844. Actions for injuries by fire—Costs and attorneys' fees. Where title to land is not involved in an action against a railroad company, for negligently setting fire to the plaintiff's land, a judgment in his favor does not carry costs, under How. Ann. Mich. Stat., § 8964, subd. 2. *Fisk* v. *Wabash R. Co.*, 114 Mich. 248 (72 N. W. Rep. 205). A statute (Kan. Laws 1885, ch. 155, § 2) authorizing the allow-

ance of an attorney's fee in actions against railroad companies to recover damages caused by fire, is constitutional. *Atchison, T. & S. F. R. Co.* v. *Matthews*, 58 Kan. 447 (49 Pac. Rep. 602).

Sec. 845. Actions for injuries by fire—Measure of damages. Where the thing destroyed is a part of the realty, ordinarily, its value would be the measure of the injury to the freehold; but if, for any reason, the injury to the realty should be in fact less than the value of the thing destroyed, the measure of recovery would be limited to the actual diminution in the value of the realty. *Missouri, K. & T. Ry. Co.* v. *Lycan*, 57 Kan. 635 (47 Pac. Rep. 526). Where an orchard has been destroyed, the measure of damages is the difference between the fair market value of the farm upon which the orchard was situated, not including the grass or fencess injured or destroyed, immediatly before the fire and its fair market value immediately after the fire, as injuriously affected by said fire. *Rowe* v. *Chicago & N. W. Ry. Co.*, 102 Ia. 286 (71 N. W. Rep. 409). The court say: "The true rule in such cases is that, 'when the property destroyed or injured is so closely connected with the real estate on which it stands or to which it is attached that it has no value separate and independent of the real estate, or the injury is to the soil itself, the measure of damages is the difference in value between the real estate before the injury and after it.' 3 Elliott, R. R. § 1239; *Hayes* v. *Railroad Co.*, 45 Minn. 17 (47 N. W. Rep. 260), and cases cited; *Railroad Co.* v. *Spencer*, 149 Ill. 97 (36 N. E. Rep. 91); *Moore* v. *Railroad Co.*, 78 Wis. 120 (47 N. W. Rep. 273; *Dwight* v. *Railroad Co.*, 132 N. Y. 199 (30 N. E. Rep. 898; 15 L. R. A. 612), and cases cited; *Ward* v. *Railway Co.*, 61 Minn. 449 (63 N. W. Rep. 1104); *Railroad Co.* v. *Haynes*, 1 Kan. App. 586 (42 Pac. Rep. 259); *Railroad Co.* v. *Hoover*, 3 Kan. App. 577 (43 Pac. Rep. 854); *Railroad Co.* v. *Wallace*, 74 Tex. 581 (12 S.W. Rep. 227); *Railroad Co.* v. *Fulmore*, Tex. Civ. App. (29 S. W. Rep. 688); *Railroad Co.* v. *Countryman*, 16 Ind. App. 139 (44 N. E. Rep. 265); 5 Am. & Eng. Enc. Law, p. 86." No damages can be awarded to the owner of an orange orchard for its destruction by fire set out by a railroad company, where it

appears that the owner had abandoned the orchard and allowed it to run to waste and become so dilapidated and overgrown with weeds and grass that extinguishment by fire would prove a benefit rather than an injury to him. *Bossu* v. *New Orleans, Ft. J. & G. I. R. Co.*, 49 La. 1593 (22 So. Rep. 809). The liability of a railroad company for property destroyed by fire under Mass. Pub. Stat., ch. 112, § 214, is that of an insurer, being idemnity for the loss actually sustained. In case of destruction of buildings, where the market value would not afford full idemnity, the measure of damages may be determined by taking into consideration their original cost, the cost of replacing them, making allowance for depreciation on account of age and use. *Wall* v. *Platt*, 169 Mass. 398 (48 N. E. Rep. 270).

Sec. 846. Actions for injuries by fire—Evidence. The fact that a fire was started by a locomotive, may be proved by circumstantial evidence. *Hemmi* v. *Chicago G. W. Ry. Co.*, 102 Ia. 25 (70 N. W. Rep. 746); *Atchison, T. & S. F. R. Co.* v. *Mathews*, 58 Kan. 447 (49 Pac. Rep. 602). Where the chief damage was the destruction of an orchard upon a farm, evidence of the value of its product for several years prior to the fire is admissible. *Rowe* v. *Chicago & N. W. Ry. Co.*, 102 Ia. 286 (71 N. W. Rep. 409). In an action against a railroad company for injury by fire, it is competent to show that the same engine started other fires on the same day. *Thomas* v. *New York, C. & St. L. R. Co.*, 182 Pa. St. 538 (38 Atl. Rep. 413); *Lake Erie & W. R. Co.* v. *Gould*, 18 Ind. App. 275 (47 N. E. Rep. 941). Statements of an employe of a railroad company who started the fire, on account of which the action is brought, made while the fire was burning, are admissible. *Mobile & O. R. Co.* v. *Stinson*, 74 Miss. 453 (21 So. Rep. 14). When it is claimed that a certain engine, in charge of a particular engineer, was defective, and was so negligently managed as to unnecessarily throw out fire, from which damage resulted, testimony of the condition of another engine, or of the careless conduct of other engineers, is ordinarily not admissible. The declarations of the section foreman and depot agent of a railroad company, made after the fire occurred, in regard to the condition and manage-

ment of the engine, and which had no connection with the business committed to them, are mere hearsay. *Atchison, T. & S. F. R. Co.* v. *Osborn*, 58 Kan. 768 (51 Pac. Rep. 286). One testifying to the quantity and value of grain destroyed, must confine his testimony to his own knowledge. *Atchison, T. & S. F. R. Co.* v. *Osborn*, 58 Kan. 768 (51 Pac. Rep. 286). For cases determining particular questions of evidence in actions against a railroad company for injury to property by fire, see *Tyler* v. *Chicago & N. W. Ry. Co.*, 102 Ia. 632 (71 N. W. Rep. 536); *Montague* v. *Minneapolis, St. P. & S. Ste M. Ry. Co.*, 96 Wis. 633 (72 N. W. Rep. 41); *Missouri, K. & T. Ry. Co.* v. *Lycan*, 57 Kan. 635 (47 Pac. Rep. 526); *Kimball* v. *Borden*, 95 Va. 203 (28 S. E. Rep. 207). Particular evidence held insufficient to authorize a peremptory instruction in favor of the defendant. *Taylor* v. *Louisville & N. R. Co.*, Ky. (41 S. W. Rep. 551). Particular evidence held insufficient to authorize a recovery of damages from a landowner on account of fire started by his employe. *Thiele* v. *Newman*, 116 Cal. 571 (48 Pac. Rep. 713). Particular cases in which the question of negligence was held to be a question for the jury. *Hemmi* v. *Chicago G. W. Ry. Co.*, 102 Ia. 25 (70 N. W. Rep. 746); *Whitson* v. *Ames*, 68 Minn. 23 (70 N. W. Rep. 793); *Thomas* v. *New York, C. & St. L. R. Co.*, 182 Pa. St. 538 (38 Atl. Rep. 413); *Patteson* v. *Chesapeake & O. R. Co.*, 94 Va. 16 (26 S. E. Rep. 393). Particular evidence held to show that a fire destroying property was caused by the negligence of a railroad company. *New York, C. & St. L. R. Co.* v. *Grossman*, 17 Ind. App. 652 (46 N. E. Rep. 546); *Atchison, T. & S. F. R. Co.* v. *Mathews*, 58 Kan. 447 (49 Pac. Rep. 602); *Mobile & O. R. Co.* v. *Stinson*, 74 Miss. 453 (21 So. Rep. 14).

Sec. 847. Miscellaneous notes. To sustain an action for damages to property by fire, it must appear that the injury resulted from the defendant's negligence. *Dolby* v. *Hearn*, 1 Marv. (Del.) 153 (37 Atl. Rep. 45). To entitle one to recover damages for the destruction of property by fire, he must be the owner thereof. One who has cut hay from the unappropriated lands of the United States has such ownership thereof, as he may sue for its destruction by fire negligently set out by

another. *Mathews* v. *Great Northern Ry. Co.*, 7 N. Dak. 81 (72 N. W. Rep. 1085). A landowner may become liable for damages resulting from a fire negligently started by one with whom he has contracted to clear his land, where the negligence flows directly from the acts which the contractor agrees to do, and is by the landowner authorized to do, and is the natural and proper consequence of the performance of the work in the manner and time agreed upon. *Cameron* v. *Oberlin*, 19 Ind. App. 142 (48 N. E. Rep. 886). For an exhaustive discussion and collection of authorities as to the liability of one storing gunpowder and dynamite for injuries caused to property by their explosion, see *Kinney* v. *Koopman*, 116 Ala. 310 (22 So. Rep. 593; 37 L. R. A. 497); *Rudder* v. *Koopman*, 116 Ala. 332 (22 So. Rep. 601; 37 L. R. A. 489).

STATUTE OF FRAUDS.

EPITOME OF CASES.

Sec. 848. As to what contracts are within the statute of frauds. A parol promise to reconvey lands, made by a grantee to whom they have been conveyed in order to defeat creditors, is void. *Poppe* v. *Poppe*, 114 Mich. 649 (72 N. W. Rep. 612). An oral agreement by an owner of land to give an interest therein to one who contributes money to build a house thereon, is within the statute of frauds. *Walker's Adm'r* v. *Tyler*, 94 Va. 532 (27 S. E. Rep. 434). A parol sale of growing trees to be cut and removed, is void under the statute of frauds. *Walton* v. *Lowrey*, 74 Miss. 484 (21 So. Rep. 243). An agreement by a debtor to mortgage to his surety, property for which he holds a contract of purchase as soon as he acquires the legal title, is concerning lands and within the statute. *Hackett* v. *Watts*, 138 Mo. 502 (40 S. W. Rep. 113). An oral agreement between the purchaser of land and one interested in the purchase, that the land shall "not be sold nor conveyed for" less than a specified sum without the latter's consent, affects the title and is void unless in writing; but an agreement between such parties that the profits

accruing from the sale should be equally divided between them, is valid though not in writing. *Pitman* v. *Hodge*, 67 N. H. 101 (86 Atl. Rep. 605). Where the guarantor of notes secured by mortgage which was insufficient security, orally agreed with the holder that if he would foreclose the mortgage and bid in the property for the full amount due, if such foreclosure did not result in the collection of the money by redemption of the premises, he would pay the holder the amount due on the notes and costs of foreclosure, the property then to be deeded to him, it is held that this contract is within the statute of frauds and was not taken out by the fact that the holder of the mortgage foreclosed it and bid in the property in his own name for the full amount due. *Veazie* v. *Morse*, 67 Minn. 100 (69 N. W. Rep. 637).

Sec. 849. As to what contracts are within the statute of frauds—Statutes construed and applied. Upon a rehearing in the case of *McIntosh* v. *Hodges*, 110 Mich. 319 (68 N. W. Rep. 158; Ballards' Law of Real Property, Vol. V, § 818), it is held that under the statute of frauds of Illinois, in force at the time the lease in question was made, it cannot be sustained as a valid lease. *McIntosh* v. *Hodges*, 110 Mich. 319 (70 N. W. Rep. 550). Under Minn. Gen. Stat. 1894, § 4212, an oral contract as to estates or interest in lands is void. *Pierce* v. *Clarke*, 71 Minn. 114 (73 N. W. Rep. 522). Overruling on this point, *Hagelin* v. *Wacks*, 61 Minn. 216 (63 N. W. Rep. 624). See opinion for particular contract held to be within the statute. Agreements concerning party walls and partition fences are within the statute. *Weems* v. *Mayfield*, 75 Miss. 286 (22 So. Rep. 892), applying Miss. Ann. Code 1892, § 2434; *Tillis* v. *Treadwell*, 117 Ala. 445 (22 So. Rep. 983). Construing and applying Neb. Comp. Stat., ch. 32, §§ 3, 5, 25, it is held that the contract of an agent in the name of his principal for the sale or leasing of lands for a period exceeding one year, is void unless the authority of the former is evidenced in writing. *O'Shea* v. *Rice*, 49 Neb. 898 (69 N.W. Rep. 308). A parol grant of the right to take water from a ditch, is the conveyance of an interest in lands, within the meaning of Wis. Rev. Stat., § 2302. *Case* v. *Hoffman*, Wis. (72 N. W. Rep. 390).

Sec. 850. As to what contracts are not within the statute of frauds. Judicial sales are not within the statute of frauds and are binding upon the bidder or purchaser without any written contract or memorandum of sale signed by him or his agent. *Robertson* v. *Smith*, 94 Va. 250 (26 S. E. Rep. 579; 64 Am. St. Rep. 723). Citing, *Andrews* v. *O'Mahoney*, 112 N. Y. 567 (20 N. E. Rep. 374); *Warfield* v. *Dorsey*, 89 Md. 299 (17 Am. Rep. 562). Where one purchases lands under an agreement with a broker having them for sale, that he will refund to such purchaser the amount of his commission as a reduction in the price, such contract is not within the statute of frauds and the purchaser may maintain an action against the broker for the sum due him. *Spengeman* v. *Palestine Bldg. Ass'n*, 60 N. J. L. 357 (37 Atl. Rep. 723). The priority of liens may be fixed by a parol contract between the holders thereof. *Townsend* v. *White*, 102 Ia. 477 (71 N. W. Rep. 337); *Loewen* v. *Forsee*, 137 Mo. 29 (38 S. W. Rep. 712; 59 Am. St. Rep. 489). Citing, *Linville* v. *Savage*, 58 Mo. 248; *Rigler* v. *Light*, 90 Pa. St. 235. In Kentucky it is held that a parol contract for the sale or conveyance of land is not void, and that the defense of the statute of frauds may be waived by one charged with the performance of such a contract regardless of the objections of his creditors. *Walker* v. *Walker's Assignee*, Ky. (41 S. W. Rep. 315). An oral agreement between two parties to prospect together and share alike the benefits of any discovery or location of mining properties, water rights, and mill sites on the public lands, is not within the statute of frauds. Hill's Wash. Code, § 1422, applied. *Raymond* v. *Johnson*, 17 Wash. 232 (49 Pac. Rep. 492; 61 Am. St. Rep. 908). Citing, *Gore* v. *McBrayer*, 18 Cal. 583; *Hirbour* v. *Reeding*, 3 Mont. 15; *Murley* v. *Ennis*, 2 Colo. 300; *Welland* v. *Huber*, 8 Nev. 203. Substantially the same is held in New Mexico. Laughlin and Bantz, JJ., dissenting. *Eberle* v. *Carmichael*, 7 N. M. 696 (47 Pac. Rep. 717). As to the validity of parol agreement by a grantee to assume and pay a mortgage, see Mortgages.

Sec. 851. Sufficiency of memorandum. A memorandum of an auctioneer's sale, made by him some time after the sale, after the revocation of his authority of which the

vendee had notice, is insufficient. *Quinzel* v. *Schmidt*, N. J. L. (38 Atl. Rep. 665). It is a sufficient memorandum of an auction sale of real estate for the auctioneer to write the name of the last and highest bidder on the side of an advertisement for the sale of the land with the amount of the bid. *Proctor* v. *Finley*, 119 N. C. 536 (26 S. E. Rep. 128). A memorandum which does not state the consideration and fails to give a sufficient description of the property, does not satisfy the statute. *Cooley* v. *Lobdell*, 153 N. Y. 596 (47 N. E. Rep. 783). A memorandum designating the property sold by a name without giving the state or county in which it lies, is insufficient. *Wood* v. *Ziegler*, 99 Tenn. 515 (42 S. W. Rep. 447). A receipt which is claimed to be for a part of the purchase price, which does not so identify the lot of land to be conveyed that it can be distinguished from other lots, and contains no statement by which the intention of the parties with respect to the land can be ascertained, is not a sufficient memorandum. *Lippincott* v. *Bridgewater*, 55 N. J. Eq. 208 (36 Atl. Rep. 672). A memorandum will not be held insufficient on account of not containing a technically accurate description, where the writing or writings relied upon show in themselves that both parties referred to the same property, the identity of which can be established by parol. *Peay* v. *Seigler*, 48 S. C. 496 (26 S. E. Rep. 885; 59 Am. St. Rep. 781). A contract of sale, in which a vendor agrees, "if desired by the purchaser, to give said deed and abstract when one-half of said purchase price is paid, and to accept a purchase money mortgage, drawing interest at the rate of 6 per cent. per annum for the other one-half of said purchase price," is not void under the statute of frauds on account of being incomplete, where previous provisions specify the amount of the purchase price, its division into payments, and the times at which the same are to be made. *Proctor* v. *Plumer*, 112 Mich. 393 (70 N. W. Rep. 1028). Where the statute of frauds requires a contract for the sale of land to be evidenced by a written instrument signed by the vendor, it is held that a written promise, executed by the vendee, to pay a certain consideration when he receives a deed from the vendor, will not sustain an action for the price named, though there was a tender of a sufficient deed, but without a preceding oral acceptance. *Kroll*

v. *Diamond Match Co.*, 113 Mich. 196 (71 N. W. Rep. 630). A note or memorandum of contract for the sale of real estate, in the form of a letter addressed to a third person, which describes the land to be conveyed and which admits payment in full of the contract price, is sufficient under the statute of frauds, although the amount of such contract price and the kind of deed to be executed are not stated; and unless the contract evidenced by such note or memorandum is affected by fraud or other inequitable circumstance, the courts are bound to order its specific performance. *Miller* v. *Kansas City, Ft. S. & M. R. Co.*, 58 Kan. 189 (48 Pac. Rep. 858). A written petition presented to the city council for the privilege of laying a private sewer in the public streets, specifically describing the route, followed by a resolution of the council referring the matter to a committee and the execution of a bond by the petitioner referring to the petition and its approval, constitutes a contract in writing for the use of the streets sufficient to satisfy the statute of frauds. *Stevens* v. *City of Muskegon*, 111 Mich. 72 (69 N. W. Rep. 227; 36 L. R. A. 777). A provision in a lease, that the lessor is to give the lessee 60 days' notice of his desire to sell the premises and that the latter is to have "the first opportunity to purchase said premises provided he will pay as much as any other person," is sufficient to take the contract out of the statute of frauds. *Marske* v. *Willard*, 169 Ill. 276 (48 N. E. Rep. 290). For particular letters by vendor to his agent and receipt by agent to the purchaser held to constitute a sufficient memorandum, see *Peay* v. *Seigler*, 48 S. C. 496 (26 S. E. Rep. 885; 59 Am. St. Rep. 731). Mass. Pub. Stat., ch. 78, § 1, cl. 4, applied—particular memoranda held insufficient to satisfy the statute. *John F. Fowkes Mfg. Co.* v. *Metcalf*, 169 Mass. 595 (48 N. E. Rep. 848).

Sec. 852. Sufficiency of memorandum—Signing. A contract of sale is binding on the seller where it is signed alone by him, and a vendee accepting it is bound for its performance. *Monongah Coal & Coke Co.* v. *Fleming*, 42 W. Va. 538 (26 S. E. Rep. 201). The signature of the vendor alone to a contract for the sale of land is sufficient to satisfy the statute of frauds. *Borie* v. *Satterthwaite*, 180 Pa. St. 542 (37 Atl. Rep. 102). It is sufficient for a memorandum to

be signed by the parties to be charged. The resolution of a board of directors of a corporation, duly signed by its president and secretary, which sufficiently set forth the terms of the contract is a sufficient compliance with the statute of frauds. *Central Land Co.* v. *Johnson*, 95 Va. 228 (28 S. E. Rep. 175).

Sec. 853. Parol gifts of real estate. A parol gift of lands by parents to their son if he would move thereon and improve the same, may be specifically enforced by him, or his heirs, where he has performed all the conditions. *Briggs* v. *Briggs*, 113 Mich. 371 (71 N. W. Rep. 632); *Hubbard* v. *Hubbard*, 140 Mo. 300 (41 S. W. Rep. 749). Where parents agree witn their son-in-law to give him certain land when they are done with it if he will move upon and improve it, he may maintain an action for their breach of the contract by conveying the land to another. *Albright* v. *Hannah*, 108 Ia. 98 (72 N. W. Rep. 421). Particular evidence held sufficient to establish a parol gift of land. *Ward* v. *Edge*, 100 Ky. 757 (39 S. W. Rep. 440; *Loney* v. *Loney*, 86 Md. 652 (38 Atl. Rep. 1071). Where, after several years of part performance by a son, of a parol contract between him and his father, by which, in consideration of his doing certain things, the father is to give him all his real and personal property at his decease, the father transfers by writing one-half of his property to the son, it is held that the parol contract as to the remainder of the property is not merged in such writing, but may be specifically enforced upon the father's decease. *Pike* v. *Pike*, 69 Vt. 535 (38 Atl. Rep. 265).

Sec. 854. Part performance. A sufficient part performance of an oral contract between persons exchanging lands, by which one party agrees to reduce an incumbrance on the land to be conveyed by him, is shown by the fact that they exchanged deeds. *Bennett* v. *Knowles*, 111 Mich. 226 (69 N. W. Rep 491). A parol agreement between tenants in common not to seek partition of their land, may be enforced where it has been so far performed that to permit a cotenant to repudiate it, would of itself be a fraud. *Martin* v. *Martin*, 170 Ill. 689 (48 N. E. Rep. 924; 62 Am. St. Rep.

411). Acts which do not unmistakably point to a contract existing between the parties, or which can reasonably be accounted for in some other manner than as having been done in pursuance of such a contract, do not constitute a part performance sufficient in any case to take it out of the operation of the statute, even though a verbal agreement has actually been made between the parties. *Van Epps* v. *Redfield*, 69 Conn. 104 (36 Atl. Rep. 1011). Evidence of part performance of a parol sale of land by a father to his children, is not sufficient to take it out of the statute of frauds where it does not show a change, in pursuance of the contract, in possession or management of the farm, or performance or part performance of it by the vendee which cannot be compensated in damages. *Derr* v. *Ackerman*, 182 Pa. St. 591 (38 Atl. Rep. 475). An offer by letter to sell land upon terms therein stated, orally accepted by the proposed vendee, and executed by him as to part of such terms, is a valid contract of sale, as against the statute of frauds, and entitles the vendee, if in possession, to resist ejectment brought against him by the vendor, and to show by oral evidence his readiness and ability to complete the purchase according to such contract, and that his failure to do so is attributable to his vendor. *Bogle* v. *Jarvis*, 58 Kan. 76 (48 Pac. Rep. 558).

Sec. 855. Part performance—Payment of purchase price. A sale by an agent under parol authority is taken out of the statute of frauds by payment of the purchase money and the surrender of the possession to the purchaser. *Rovelsky* v. *Scheuer*, 114 Ala. 419 (21 So. Rep. 785). A parol contract for the sale of several parcels of land, is taken out of the statute of frauds by the payment of part of the purchase price and delivery of possession of one of the parcels. *Bartz* v. *Paff*, 95 Wis. 95 (69 N. W. Rep. 297; 37 L. R. A. 848). The payment of a portion of the purchase price is not sufficient. *Lippincott* v. *Bridgewater*, 55 N. J. Eq. 208 (36 Atl. Rep. 672). Nor is the payment of the whole consideration. *Cooley* v. *Lobdell*, 153 N. Y. 596 (47 N. E. Rep. 788). Payment of part of the purchase price by one acting as the agent of the vendor, is not available to the vendee as such a part payment as will take a parol contract out of the statute of frauds.

Benedict v. *Bird*, 108 Ia. 612 (72 N. W. Rep. 768). Construing Ia. Code 1873, § 3664, which prohibits oral evidence of contracts "for the creation or transfer of any interest in lands, except leases for a term not exceeding one year," and § 3665, which provides that this statute does not apply "where the purchase money or any portion thereof, has been received by the vendor," it is held that the term "purchase money" means the consideration paid, and may be property or labor performed. *Harlan* v. *Harlan*, 102 Ia. 701 (72 N. W. Rep. 286).

Sec. 856. Part performance—Possession and improvements. In order for possession to entitle a person to specific execution of a parol contract, it must be actual, notorious and exclusive. *Woods* v. *Stephenson*, 43 W. Va. 149 (27 S. E.Rep. 309). Where a vendee is placed in possession by the agent of the vendor to whom he pays part of the purchase price, there is a sufficient part performance to take the contract out of the statute of frauds. *Peay* v. *Seigler*, 48 S. C. 496 (26 S. E. Rep. 885; 59 Am. St. Rep. 731). Where a vendee in a parol contract for the sale of land pays part of the consideration, takes possession and makes valuable improvements, the contract will be held to be taken out of the statute of frauds. *Goodwin* v. *Smith*, 89 Me. 506 (36 Atl. Rep. 997). In West Virginia it is held that in action to enforce specific performance of a parol contract to devise or convey real estate, the taking of possession under the contract is essential to a performance of it. *Goodwin* v. *Bartlett*, 43 W. Va. 332 (27 S. E. Rep. 325). Possession of land, in order to take a verbal contract for its purchase out of the statute, must be taken with the specific intent of carrying out the contract. Such intent cannot be shown by the oral contract. If the possession is not a new fact, but is a continuation of a former similar condition, the intent must be proved by some further act which shows, without any equivocation or uncertainty, that the possession cannot be accounted for except by the verbal contract of purchase. Possession by a son raises no presumption that it was taken pursuant to any contract for the purchase of the land. *Bresnahan* v. *Bresnahan*, 71 Minn. 1 (78 N. W. Rep. 515). Particular facts held insufficient to show

such a taking of possession as will take a parol contract for the sale of lands out of the statute of frauds, under Ia. Code 1873, § 3665. *Benedict* v. *Bird*, 103 Ia. 612 (72 N. W. Rep. 768). In order for the making of improvements to take a verbal contract for the sale of lands out of the statute of frauds, they must be substantial and permanent in character, such as that a loss thereof would be a sacrifice to the purchaser and such as would not have been made except in reliance on the contract. *Cooley* v. *Lobdell*, 153 N. Y. 596 (47 N. E. Rep. 783). Where a father makes a verbal gift of land to his son and the son enters into possession and expends money and labor in making valuable improvements of a permanent character, he is entitled to specific performance. *Loney* v. *Loney*, 86 Md. 562 (38 Atl. Rep. 1071). The statute of frauds relative to the sale of land, will not enable one who has obtained the title and possession of real estate to avoid making payment therefor, merely because there had been no formal acceptance in writing of the original offer of the purchaser. *Griffiths* v. *Thompson*, 50 Neb. 424 (69 N. W. Rep. 946).

Sec. 857. Miscellaneous notes. A contract entered into between a person desiring to purchase land and one who claims ownership of the same, which recites that title to such land is in a third person, and in which contract such claimant does not assume to act as agent for such third person, but agrees only to procure from him a deed to such land, is not, under the statute of frauds, a contract of sale by such third person, even though he knew of and assented to the making of the same. *Deiderick* v. *Alexander*, 58 Kan. 56 (48 Pac. Rep. 594). A general denial in an action on a contract properly raises the defense of the statute of frauds. *Hackett* v. *Watts*, 138 Mo. 502 (40 S. W. Rep. 113). Ia. Code 1873, § 3666, construed and applied — sufficiency of answer to admit parol proof of an oral contract. *Benedict* v. *Bird*, 103 Ia. 612 (72 N. W. Rep. 768).

STATUTE OF LIMITATIONS.

EPITOME OF CASES.

Sec. 858. As to when the statute applies—Statute construed. The statute will not be applied to bar an equitable action to correct a mistake as against one who has been diligent in discovering the mistake. *Oldham* v. *Medearis*, 90 Tex. 506 (39 S. W. Rep. 919). As a general rule equity follows the law with respect to the statute of limitations; if a legal right would be barred in a suit to enforce it in a court of law, it or an analogous equitable right will be likewise barred to enforce it in the equitable forum. *Dumright* v. *Hite*, Va. (26 S. E. Rep. 588). The lien of debts charged by a testator against his real estate, may be barred by the statute of limitations, unless an express trust is created for their payment, and a mere general direction that his debts be paid does not create such a trust. *In re Mitchell's Estate*, 182 Pa. St. 530 (38 Atl. Rep. 489). A statute in force at the time an action is brought, determines whether or not it is barred by limitation. *McKenzie* v. *A. P. Cook Co.*, 118 Mich. 452 (71 N. W. Rep. 868). Construing U. S. Rev. Stat., § 5057, fixing a limitation of two years upon actions "between an assignee in bankruptcy and a person claiming an adverse interest touching property or rights of property transferrable to, or vested in, such assignee," it is held that the statute is applicable only to suits growing out of disputes in respect to the property of the bankrupt which came to the hands of the assignee to which adverse claims existed while in the hands of the bankrupt and before assignment, and an action in ejectment by the assignee, founded upon a wrongful entry made after the assignment, is not barred in two years. *Bowen* v. *Delaware, L. & W. R. Co.*, 153 N. Y. 476 (47 N. E. Rep. 907; 60 Am. St. Rep. 667).

Sec. 859. As to when the statute begins to run. A covenant against incumbrances is broken if any incumbrance

exists against the land and the statute of limitations begins to run at once. *Bellamy* v. *Chambers*, 50 Neb. 146 (69 N. W. Rep. 770). The statute does not begin to run against an action to rescind a deed on account of a mistake until the discovery of the mistake. *Clapp* v. *Greenlee*, 100 Ia. 586 (69 N. W. Rep. 1049). The statute does not begin to run against a grantor's action to reform his deed on account of an error in the description, until he has knowledge that the grantee in the deed or some one claiming under it, is asserting some claim or right not intended to be embraced in the instrument and not apparent from its terms. *DeForest* v. *Walters*, 153 N. Y. 229 (47 N. E. Rep. 294). The statute does not begin to run against the right of heirs to have dower assigned in the mansion house and messuages, to the possession of which the widow is entitled, until after her death. *Carey* v. *West*, 139 Mo. 146 (40 S. W. Rep. 661). An action against a railroad company for damages, resulting from its obstructing the flow of water by the negligent construction of its road bed, accrues at the date of the injury and not at the date of the negligent construction of the improvement. *Chicago, B. & Q. R. Co.* v. *Emmert*, 53 Neb. 237 (73 N. W. Rep. 540). Citing, *Fremont, E. & M. V. R. Co.* v. *Harlin*, 50 Neb. 698 (70 N. W. Rep. 263; 61 Am. St. Rep. 578; 36 L. R. A. 417). How. Ann. Mich. Stat., § 8736, which requires an action on a decree to be brought within ten years "after the entry" thereof, requires an action on a deficiency judgment in a foreclosure proceeding to be brought within ten years from the date of the decree. *Smith* v. *Pegg*, 111 Mich. 232 (69 N. W. Rep. 488). The rent for property held under a tenancy from year to year, becomes due at the end of each year, and the statute begins to run against an action therefor at that time. *Cowan* v. *Henika*, 19 Ind. App. 40 (48 N. E. Rep. 809). Where a debtor conveys land in trust primarily for the benefit of his creditors and then for the benefit of his wife and children, the statute of limitations begins to run in favor of a creditor who purchases the land at a sale made to enforce the trust for the creditors, as against the wife and children. *Drumright* v. *Hite*, Va. (26 S. E. Rep. 583). Where a statute (Wis. Rev. Stat., § 2198), gives the remainder man the right to bring an action for any injuries

done to the inheritance, notwithstanding any intervening estate for life, the right of a remainder man to recover compensation for the taking of the land for a railroad right of way, under Wis. Rev. Stat., § 1852, is barred in six years from the taking, though the life tenant died within that time. *Hooe* v. *Chicago, M. & St. P. R. Co.*, 98 Wis. 302 (73 N. W. Rep. 787). Particular facts held sufficient to charge an infant on becoming of age with notice of the fraud of her guardian in conveying her land, so as to start the statute of limitations to running. *Wickham* v. *Sprague*, 18 Wash. 466 (51 Pac. Rep. 1055).

Sec. 860. As to when the statute begins to run—Actions for relief from fraud. Construing Minn. Gen. Stat. 1894, § 5186, subd. 6, which provides that actions "for relief on the ground of fraud," must be brought within six years after "the discovery by the aggrieved party of the facts constituting the fraud," it is held that the statute being borrowed from equity, it must be construed in accordance with the equitable principle which required the defrauded party to be diligent, and which deemed means of discovery as equivalent to actual discovery. The facts constituting the fraud are deemed to have been discovered when, with reasonable diligence, they could and ought to have been discovered. Hence the burden is on the plaintiff to prove not merely that he did not discover the facts constituting the fraud until within six years before the commencement of the action, but also that his failure to discover them sooner was consistent with reasonable diligence on his part, and not the result of his own negligence. *Duxbury* v. *Boice*, 70 Minn. 113 (72 N. W. Rep. 838). Citing, *Board* v. *Smith*, 22 Minn. 97; *Fritschler* v. *Koehler*, 83 Ky. 78; *Norris* v. *Haggin*, 28 Fed. Rep. 275; *Wood* v. *Carpenter*, 101 U. S. 139; *Parker* v. *Kuhn*, 21 Neb. 413 (32 N. W. Rep. 74).

Sec. 861. Disabilities of parties. A disability which will arrest the running of the statute of limitations must exist at the time the cause of action accrues. If the statute once begins to run against a party, it so continues until the bar is complete. No subsequent disability, not even insanity, will

impede it. *Kelly* v. *Gallup*, 67 Minn. 169 (69 N. W. Rep. 812). Citing, Ang. Lim., § 196; 2 Wood, Lim. 578; *Moore* v. *Armstrong*, 10 Ohio 11 (36 Am. Dec. 68); *Lincoln* v. *Norton*, 36 Vt. 679; *Clark's Ex'r* v. *Trail's Adm'rs*, 1 Metc. (Ky.) 35; *Allis* v. *Moore*, 2 Allen 306. It is not sufficient for one claiming the benefit of the disability of a married woman, to show the existence of the marital relation, prior to the accrual of the cause of action, but such relation must be shown to have continued until after that time. *Bodkins* v. *Phillips*, Tenn. (42 S. W. Rep. 158).

Sec. 862. Interruption or suspension of statute. The fact that one who has himself joined as a plaintiff in an action, has been a defendant therein for a long time but during which he sought no affirmative relief, does not prevent the statute from running against him up to the time he is made a plaintiff. *Buck* v. *Davis*, 64 Ark. 345 (42 S. W. Rep. 584). In the absence of a fiduciary relation existing between them, the fact that a purchaser of land conceals its value from his vendor who has an opportunity to ascertain it, is not such fraudulent concealment as will prevent the running of the statute of limitations. *Woodfolk* v. *Marley*, 98 Tenn. 467 (39 S. W. Rep. 747; 40 S. W. Rep. 479). Where, in an action to foreclose a prior mortgage a junior mortgagee files a cross bill seeking to establish the priority of his mortgage and upon default of the mortgagor the cross bill is dismissed and the prior mortgage foreclosed, it is held that such default does not operate as a new promise in writing so as to interfere with the running of the statute of limitations against the foreclosure of the junior mortgage. *Boone* v. *Colehour*, 165 Ill. 305 (46 N. E. Rep. 258). Where a statute (Ill. Rev. Stat., ch. 83, § 18) excepts from the period of limitation the time during which the debtor is absent from the state, it applies to an action to foreclose a mortgage and such action is stayed by such absence of the mortgagor though he has conveyed the land to another. *Richey* v. *Sinclair*, 167 Ill. 184 (47 N. E. Rep. 364).

Sec. 863. Laches — General principles. A party cannot be barred by laches from asserting a right of which he was ignorant. *Jameson* v. *Rixey*, 94 Va. 342 (26 S. E. Rep.

861; 64 Am. St. Rep. 726); *Hull* v. *Watts*, 95 Va. 10 (27 S. E. Rep. 829). Mere lapse of time when the parties remain in the same relative position and the delay has worked no serious wrong to the adverse party so that justice can still be done, although an important ingredient in the law of laches, will not operate as a bar in equity. *Hamilton* v. *Dooly*, 15 Utah 280 (49 Pac. Rep. 769). Laches may consist not only in negligently instituting a suit, but also in negligently prosecuting it after it is begun. *Hagerman* v. *Bates*, 24 Col. 71 (49 Pac. Rep. 139). To constitute a bar when the statute has not run, there must be delay together with facts and circumstances during such delay to the prejudice of innocent parties. *Kropp* v. *Kropp*, 97 Wis. 137 (72 N. W. Rep. 381). In order for delay to constitute laches, the party against whom it is asserted must have been under obligation to act during the time of the delay. *Demuth* v. *Old Town Bank*, 85 Md. 315 (37 Atl. Rep. 266; 60 Am. St. Rep. 322). An action for the violation of an express trust may be barred by laches. *Preston* v. *Horwitz*, 85 Md. 164 (36 Atl. Rep. 710).

Sec. 864. Laches—Particular cases. The defense of laches is available against the United States in an action by it to cancel a patent where there has been a delay of twelve years during which innocent purchasers have acquired rights in the land. *United States* v. *Blackburn*, Ariz. (48 Pac. Rep. 904). Heirs of an insane person, who seek to set aside a guardian's sale of his land on account of constructive fraud, are not chargeable with laches for failure to act during the life time of their ancestor. *Heyl* v. *Goelz*, 97 Wis. 327 (72 N. W. Rep. 626). A delay by a vendee to bring his action for specific performance for three years after the vendor has notified him that he will not perform the contract, will bar the action. *Ketcham* v. *Owen*, 55 N. J. Eq. 344 (36 Atl. Rep. 1095). A purchaser at an execution sale is not barred from asserting the priority of the judgment under which he claims over a mortgage given for advances, where the mortgagee had notice of the judgment, by a delay for the period given him by the statute of limitations for the assertion of his rights under the judgment. *Schmidt* v. *Hedden*, N. J. Eq. (38 Atl. Rep. 843). Three years' delay after the

discovery of the fraud was held to bar an action to rescind a sale of land for fraud. *Woodfolk* v. *Marley*, 98 Tenn. 467 (39 S. W. Rep. 747; 40 S. W. Rep. 479). As to what is sufficient laches to bar an action to rescind a contract for fraud, see *Cornell* v. *Crane*, 118 Mich. 460 (71 N. W. Rep. 878). A creditor's delay for ten years to bring an action to set aside a fraudulent conveyance by his debtor, will bar such action, where, in the meantime, the grantee has exchanged the land for other lands and conveyed the latter to a subsequent purchaser for value. *Kinmouth* v. *Walling*, N. J. Eq. (36 Atl. Rep. 891). An action by a substituted trustee in insolvency to cancel conveyances made by his debtor to the original trustee before his appointment, will be held barred by laches, where such conveyances were executed more than twenty years, thirteen years after the insolvency proceedings and five years after the original trustee's death. *Preston* v. *Horwitz*, 85 Md. 164 (36 Atl. Rep. 710). A subsequent creditor's action to set aside a fraudulent conveyance will not be held barred by laches where he commences the action immediately upon the recovery of a judgment on his debt, it not appearing how long the judgment debt had existed. *Brundage* v. *Cheneworth*, 101 Ia. 256 (70 N. W. Rep. 211; 63 Am. St. Rep. 382). Heirs of the devisee of a grantor, mentally incompetent to convey, who died thirteen years before his wife, who delayed during that period to bring an action to set aside his previous conveyance in consideration of the support of himself and wife, during all of which time they had full knowledge of all the facts and circumstances surrounding the transaction and knew of the continuous performance of the contract by the grantee, were held to be barred by laches from maintaining such an action after the death of the grantor's wife, they having had such a vested interest as permitted their bringing an action ever since the death of the grantor, although they offered to pay the grantee for services rendered by him under the contract. *Chase* v. *Chase*, 20 R. I. 202 (37 Atl. Rep. 804). Particular laches held insufficient to bar an action to reform a description in a deed, *Harris* v. *Ivey*, 114 Ala. 363 (21 So. Rep. 422); to rescind a deed, *Clapp* v. *Greenlee*, 100 Ia. 586 (69 N. W. Rep. 1049); to enforce a contract, *Hagerman* v. *Bates*, 24 Colo. 71 (49 Pac. Rep. 139); to reform a

contract on account of mistake, *Kropp* v. *Kropp*, 97 Wis. 187 (72 N. W. Rep. 381).

Sec. 865. Statute of limitations and laches as applied to trusts or fiduciary relations. Express trusts, cognizable only in equity, are alone free from limitation created by laches or statute. All other trusts, whether legal or equitable, are either subject to the statute of limitations or liable to be barred by laches. *Woods* v. *Stephenson*, 43 W. Va. 149 (27 S. E. Rep. 309). In New Jersey it is held that the rule in equity is, that the statute of limitations has no application to an action between the *cestui que trust*, and a trustee for the enforcement of an express trust. *Carter* v. *Uhlein*, N. J. Eq. (36 Atl. Rep. 956). If the trustees who hold the legal title allow the statute of limitations to bar them or a presumption of a grant to arise, a right of action for the land is barred and their *cestui que trustent* are barred also. *Benbow* v. *Levi*, 50 S. C. 120 (27 S. E. Rep. 655). The statute of limitations begins to run against the beneficiary of a trust who has knowledge of his trustee's conveyance in violation of the trust, from the date of such conveyance. *Nougues* v. *Newlands*, 118 Cal. 102 (50 Pac. Rep. 386). An action by a *cestui que trust*, to enforce a continuing trust with no specification of time when it shall be performed, under which the trustee is in possession, is not barred by laches so long as the acts of the trustee were such as led the *cestui que trust* reasonably to expect the trustee to perform his duty. *Carter* v. *Uhlein*, N. J. Eq. (36 Atl. Rep. 956). A wife's action to recover property of which she has been fraudulently deprived, will not be debarred on account of laches by a delay of two years after her discovery of the fraud, where the action involved a charge of fraud against her husband with whom she is living. *Connar* v. *Leach*, 84 Md. 571 (36 Atl. Rep. 591). Particular case in which the right to enforce an alleged resulting trust was held barred on account of laches. *Woods* v. *Stephenson*, 43 W. Va. 149 (27 S. E. Rep. 309). Particular delay held insufficient to bar an action to enforce a trust on account of laches. *Wolcott* v. *Wilsey*, 141 Mo. 200 (42 S. W. Rep. 825). Particular facts held not to constitute such laches, as will bar a co-tenant from assailing a title

acquired by another cotenant to the property, on account of his violating the fiduciary relation. *Saladin* v. *Kraayvanger*, 96 Wis. 180 (70 N. W. Rep. 1118).

STATUTORY PROVISIONS.

[In Vol. V, §§ 841–888, will be found a compilation of the statutory provisions of the several states and territories concerning the limitations of the various actions affecting real estate. Below we give such amendments, changes and additional constructions as have been made.]

Sec. 866. Arkansas. (See Vol. 5, § 843.) Sand. & H. Dig., § 4818, does not apply to an action to remove a cloud from the title to land sold for taxes. *Streett* v. *Reynolds*, 63 Ark. 1(38 S. W. Rep. 150). A tax sale is not a judicial sale within the meaning of the statute prescribing the limitation upon an action to recover lands from a purchaser at a judicial sale. *Worthern* v. *Fletcher*, 64 Ark. 662 (42 S. W. Rep. 900). Sand. & H. Ark. Dig., § 4815, construed and applied—disability of married woman. *Rowland* v. *McGuire*, 64 Ark. 412 (42 S. W. Rep. 1068). Sand. & H. Ark. Dig., §§ 5094, 5095, prescribing the same period of limitations for an action to foreclose a mortgage as would bar an action on the debt secured, and providing that payments on the debt shall not extend the time for enforcing the mortgage unless a memorandum thereof is endorsed on the record by the mortgagee, is constitutional and the statute is applicable to mortgages with power of sale, and deeds of trust, when sought to be foreclosed by trustee's sale or an action of ejectment by the trustee. *Hill* v. *Gregory*, 64 Ark. 317 (42 S. W. Rep. 408); *American Mortg. Co.* v. *Milam*, 64 Ark. 305 (42 S. W. Rep. 417. The provision of the statute in regard to making record memoranda of payments applies to payments made only after the passage of the act. *Fayetteville B. & L. Assn'n* v. *Bowlin*, 63 Ark. 573 (39 S. W. Rep. 1046).

Sec. 867. California. (See Vol. V. § 844.) An action by one having full knowledge of all the facts to establish against another an implied trust, is barred in four years from the date of the act creating the trust. Cal. Code Civ. Proc., § 343, applied. *Nougues* v. *Newlands*, 118 Cal. 102 (50 Pac. Rep. 386).

Sec. 868. Florida. (See Vol. V, § 848.) The statute of limitations against an action by a former owner to recover land sold for taxes, begins to run from the execution and delivery of the tax deed. Fla. Laws 1887, ch. 3681, § 60, construed and applied. *Spaulding* v. *Ellsworth*, 39 Fla. 76 (21 So. Rep. 812.)

Sec. 869. Indiana. (See Vol. V, § 852.) Rev. Stat. 1894, § 294. which prohibits an action for the recovery of real property sold on execution, by the execution debtor or any person claiming under him after

ten years, applies to sales irregular or absolutely void from defective descriptions or other causes. *Marley* v. *State*, 147 Ind. 145 (46 N. E. Rep. 466). Under Ind. Rev. Stat. 1894, § 2487, a proceeding by an administrator to sell lands fraudulently conveyed by his decedent, must be brought within five years after the decedent's death. *Galentine* v. *Brubaker*, 147 Ind. 458 (46 N. E. Rep. 903).

Sec. 870. Kansas. (See Vol. V, § 854.) Under Code Civ. Proc., § 16, an action brought to recover lands sold for taxes by one claiming under a tax deed, must be brought within two years after his cause of action accrues. *Coale* v. *Campbell*, 58 Kan. 480 (49 Pac. Rep. 604).

Sec. 871. Louisania. (See Vol. V, § 856.) In a petitory action brought by the parties claiming to own individual interests in an immovable, against parties possessing and claiming to hold in indivision the whole immovable, defendants are entitled to plead the prescription of ten years, although an action by partition is only barred by thirty years. Under such a condition, arts. 1304, 1305, Rev. Civ. Code, regulating prescription and possession between coheirs and coowners do not govern. *Ogden* v. *Leland University*, 49 La. 190 (21 So. Rep. 685).

Sec. 872. Michigan. (See Vol. V, § 860.) No action for the recovery of any estate sold by a trustee under the provisions of Act No. 253, Laws 1899, "shall be maintained by any beneficiary of the trust, or other persons claiming under him, unless it is commenced within five years next after the sale. This section shall not apply to persons out of the State, nor to minors, or others under any legal disability to sue, at the time when the right of action shall first accrue; but all such persons may commence such action at any time within three years after the removal of the disability, or their return to this State." Laws 1899, No. 253, § 16

Sec. 873. Minnesota. (See Vol. V, § 861.) Minn. Laws 1889, ch. 91 (Gen. Stat. 1894, § 5134), reducing the time within which an action for the recovery of real estate may be brought from twenty to fifteen years, was constitutionally passed. *Kelly* v. *Gallup*, 67 Minn. 169 (69 N. W. Rep. 812). Under Gen. Stat. 1894, § 5136, subd. 6, an action by a creditor to set aside a conveyance as fraudulent is barred in six years from the discovery of the facts constituting the fraud; and when such an action is brought more than six years after the commission of the acts constituting the fraud, it is held incumbent on the plaintiff to allege and prove that he did not discover the fraud until within six years of the commencement of the action. *Duxbury* v. *Boice*, 70 Minn. 113 (72 N. W. Rep. 838).

Sec. 874. Mississippi. (See Vol. V, § 862.) Under Code 1892, § 2763, a mortgagee remaining in possession for ten years after condition broken, acquires a perfect title by limitation. *Tuteur* v. *Brown*, 74 Miss. 774 (21 So. Rep. 748).

Sec. 875. Missouri. (See Vol. V, § 863.) Mo. Rev. Stat. 1889, § 6770, construed and applied—limitation of action against one in lawful possession for ten years under equitable title emanating from the government. *Shumate* v. *Snyder*, 140 Mo. 77 (41 S. W. Rep. 781); *Howell* v. *Jump*, 140 Mo. 441 (41 S. W. Rep. 976).

Sec. 876. Nebraska. (See Vol. V, § 865.) "An action for the recovery of the title or possession of lands, tenements or hereditaments can only be brought within ten years after the cause of such action shall have accrued. This section shall be construed to apply also to mortgages. Provided, however, that there shall be no limitation to the time within which any county, city, town, village or other municipal corporation may begin an action for the recovery of the title or possession of any public road, street, alley or other public grounds or city or town lots." Laws 1899, p. 335. One who has been in the open, notorious, exclusive, adverse possession of real property for ten years, becomes vested with a valid title to the same. *City of Florence* v. *White*, 50 Neb. 516 (70 N. W. Rep. 50). The statute of limitations runs against a married woman the same as if she were unmarried. *Murphy* v. *J. H. Evans City Steam Laundry Co.*, 52 Neb. 593 (72 N. W. Rep. 960). Under Neb. Code Civ. Proc., § 10 an action upon a covenant in a deed must be brought within five years after the cause of action accrued. *Bellamy* v. *Chambers*, 50 Neb. 146 (69 N. W. Rep. 770).

Sec. 877. New Mexico. (See Vol. V, § 869.) Comp. Laws (1897), § 2938, has been amended so that persons under disability have one year only after the removal of the disability for bringing an action to recover land. Laws 1899, p. 133.

Sec. 878. North Carolina. (See Vol. V, § 871.) A married woman is not prevented from claiming the benefit of Code, § 148, giving three years in which to commence an action for the recovery of real property after discoverture, by the fact that she was previously under guardianship, where it appears that the guardian had no title to the land and was not liable for failure to sue in reference thereto. *Cross* v. *Craven*, 120 N. C. 331 (26 S. E. Rep. 940). The disability of coverture is abolished, and "in all actions commenced after the ratification of this act by married women heretofore protected by sub-sections four of sections one hundred and forty-eight and one hundred and sixty-three of the Code in which the defense of adverse possession shall be relied upon, the time computed as constituting such adverse possession shall not include any possession had against such married woman prior to the passage of this act." Ratified Feb. 13, 1899. Laws 1899, p. 209, ch. 78.

Sec. 879. North Dakota. (See Vol. V, § 872.) Unknown minor heirs against whom a judgment quieting title has been taken, may be allowed to defend the action at any time within two years from the day of their becoming of age. Laws 1899, p. 229.

Sec. 880. Oregon. (See Vol. V, § 875.) Construing Hill's Ann. Or. Laws, § 4, which provides that no action shall be maintained for the recovery of real property or for the possession thereof, unless it appears that the plaintiff, his ancestor, predecessor, or grantor, was seized or possessed of the premises in question, within ten years before the commencement of such action, in connection with § 519, that the time within which an act is to be done shall be computed by excluding the first day and including the last, it is held that where a plaintiff's predecessor in title died April 30, 1884, an action for the recovery of the real estate commenced April 30, 1894, was not barred. *Grant* v. *Paddock*, 30 Or. 312 (47 Pac. Rep. 712).

Sec. 881. South Carolina. (See Vol. V, § 878.) Where a mortgage security bond has been satisfied of record, an action on the bond is barred in six years from the date of such satisfaction. *Newell* v. *Neal*, 50 S. C. 68 (27 S. E. Rep. 560). South Carolina Code 1870, §§ 98–109, construed and applied—tacking possessions. *Garrett* v. *Weinberg*, 48 S. C. 28 (26 S. E. Rep. 3).

Sec. 882. Texas. (See Vol. V, § 881.) Construing and applying Tex. Rev. Stat. 1895, arts. 3358, 3369, it is held that an action to cancel a deed on account of being procured by fraud of a deceased person, may be brought any time within five years from the discovery of the fraud. *Groesbeeck* v. *Crow*, 91 Tex. 74 (40 S. W. Rep. 1028).

Sec. 883. Virginia. (See Vol. V, § 884.) Under Code, § 2915, an action to recover land is barred in fifteen years and the same period will bar a suit in equity for land. *Drumright* v. *Hite*, Va. (26 S. E. Rep. 583). Code 1887, § 2938, applied—limitation of action to enforce a decree for owelty. *Jameson* v. *Rixey*, 94 Va. 342 (26 S. E. Rep. 861; 64 Am. St. Rep. 726). For a particular case as to the application of the statute of limitations to a trust deed, see *Bell* v. *Wood*, 94 Va. 677 (27 S. E. Rep. 504). Where a right of action accrues "against a person who, by departing without this state or by absconding or concealing himself or by continuing to reside without the state, or by any other direct way or means, shall obstruct the prosecution of such right, the time that such obstruction may have continued shall not be computed as any part of the time in which the said right might or ought to have been prosecuted." Va. Laws 1897–98, p. 441, amending Code 1887, § 2933.

Sec. 884. West Virginia. (See Vol. V, § 886.) A creditor cannot set aside a voluntary conveyance after five years from the making thereof, without proof of actual fraud, participated in by the parties to the transaction. *Scraggs* v. *Hill*, 43 W. Va. 162 (27 S. E. Rep. 310).

Sec. 885. Wisconsin. (See Vol. V, § 887.) Rev. Stat. 1898, § 1189a, has been so amended that an action to annul or set aside a tax deed or quiet title to the land conveyed may be brought in "three

years" instead of "nine months," and the provision as to tax deeds recorded after Dec. 1, 1895, has been stricken out. Laws 1899, p. 652, § 21. Rev. Stat., § 4221, has been amended so as to extend the period six months, as to actions for the recovery of damages for flowing lands, resulting from dams constructed, used or maintained for the purpose of facilitating the driving or handling of saw logs on the Chippewa, Menomonee or Eau Claire rivers or any tributary of either of them, where the ten years have already expired. Laws 1899, ch. 285. Sales of real estate by an executor, administrator or guardian which have been made and confirmed by the county court of the county in which the land lies for more than thirty years can not be set aside for irregularities. Wis. Laws 1899, ch. 185.

SURFACE WATER.

EPITOME OF CASES.

Sec. 886. What constitutes surface water—Flood water of a stream. The flood water of a stream extending beyond its ordinary bounds will not be treated as surface water. *Chicago, B. & Q. R. Co.* v. *Emmert*, 58 Neb. 237 (78 N.W. Rep. 540). Citing, *Crawford* v. *Rambo*, 44 O. St. 282 (7 N. E. Rep. 481), from which case the court quotes approvingly as follows: "It is difficult to see upon what principle the flood waters of a river can be likened to surface water. When it is said that a river is out of its banks, no more is implied than that its volume then exceeds what it ordinarily is. Whether high or low, the entire volume at any one time constitutes the water of the river at such time; and the land over which its current flows must be regarded as its channel; so that when, swollen by rains and melting snows, it extends and flows over the bottoms along its course, that is its flood channel, and when, by drouth, it is reduced to its minimum, it is then in its low-water channel. Surface water is that which is diffused over the surface of the ground, derived from falling rains and melting snows, and continues to be such until it reaches some well-defined channel in which it is accustomed to and does flow with other waters, whether derived from the surface or springs; and it then becomes the running water of a stream, and ceases to be surface water."

To the same effect, see *Byrne* v. *Railway Co.*, 38 Minn. 214 (36 N. W. Rep. 339; 8 Am. St. Rep. 668); *O'Connell* v. *Railroad Co.*, 87 Ga. 246 (13 S. E. Rep. 489; 27 Am. St. Rep. 246; 13 L. R. A. 394); *Sullens* v. *Railway Co.*, 74 Ia. 659 (38 N. W. Rep. 545; 7 Am. St. Rep. 501); *Moore* v. *Railway Co.*, 75 Ia. 268 (39 N. W. Rep. 390).

Sec. 887. Common law rule—Exceptions. The common law rule as to surface water prevails in West Virginia. *Jordan* v. *City of Benwood*, 42 W. Va. 312 (26 S. E. Rep. 266; 57 Am. St. Rep. 859; 36 L. R. A. 519). Although the common law rule as to surface waters prevails in Nebraska, under which rule such water may be controlled by the owner of the land on which it falls or over which it flows, it is held that surface waters may have such an accustomed flow as to have formed at a certain place a channel or course cut in the soil by the action of the water, with well-defined banks, and having many of the distinctive attributes of a water course; and though there are no exceptions to the general rule, except from necessity, this may constitute an exception, and, if the flow is stopped by the erection of an embankment across and in the channel, some provision may be necessary for the allowance of the regular flow of the surface waters. Whether such embankment has been negligently constructed with reference to the obstruction of the flow of surface waters, and whether such negligence, if any, is the proximate cause for an alleged injury, are generally questions to be submitted to the jury. *Town* v. *Missouri Pac. Ry. Co.*, 50 Neb. 768 (70 N. W. Rep. 402).

Sec. 888. Rights of upper and lower owners. The owner of a city lot may bring his lot to grade and thus cast back surface water which has been turned upon it by the city improving its streets. *City of Cedar Falls* v. *Hansen*, 104 Ia. 189 (73 N. W. Rep. 585; 65 Am. St. Rep. 439). An upper owner does not acquire the right to collect surface water into channels and discharge it into a stream to the injury of the lower owner, simply because a portion of such water sometimes reaches the stream in the time of flood. *Rudel* v. *Los Angeles Co.*, 118 Cal. 281 (50 Pac. Rep. 400). The

owner of land on which there is a pond or reservoir of surface water, cannot lawfully conduct it by an artificial channel to a point on his own land where it would inevitably permeate the surrounding soil and percolate through the same into his neighbor's land and permanently injure it. *Schuster* v. *Albrecht*, 98 Wis. 241 (73 N. W. Rep. 990). The right of a landowner to repel surface water from coming from his neighbor's land, does not give him the right, such water being upon his land, to divert it or cause it to flow upon the land of another in an unaccustomed volume, to his injury. *Borchsenius* v. *Chicago, St. P., M. & O. Ry. Co.*, 96 Wis. 448 (71 N. W. Rep. 884). Owners of swamp lands, the waters of which naturally flow into natural water courses, may collect and discharge the water on such lands into such water courses by ditches and canals, although the flow of the water course is thereby increased so as to occasion an overflow upon the lower owner. *Mizell* v. *McGowan*, 120 N. C. 134 (26 S. E. Rep. 783). Where a channel constructed by a landowner to conduct surface water is enlarged by natural causes so that it encroaches upon a public street to the injury of an abutting owner, the latter may maintain an action for the abatement of the ditch as a private nuisance and for damages caused by it. *Reinhart* v. *Sutton*, 58 Kan. 726 (51 Pac. Rep. 221). Citing, *Livingston* v. *McDonald*, 21 Ia. 160 (89 Am. Dec. 563); *Pettigrew* v. *Evansville*, 25 Wis. 223 (3 Am. Rep. 50).

Sec. 889. Diversion of surface water by a railroad. A railroad company, which by the negligent construction of its roadbed, either increases or obstructs the natural flow of surface water, is liable for the damages resulting to an adjoining owner. The measure of damages is the diminution in the rental value of the land by reason of the injury, computed to the commencement of the action. *Jungblum* v. *Minneapolis, N., U. & S. W. R. Co.*, 70 Minn. 153 (72 N. W. Rep. 971); *Freemont, E. & M. V. R. Co.* v. *Harlin*, 50 Neb. 698 (70 N. W. Rep. 263; 61 Am. St. Rep. 578; 36 L. R. A. 417). The first proposition cited above is supported by *Illinois Cent. R. Co.* v. *Wilbourn*, 74 Miss. 284 (21 So. Rep. 1); *Shahan* v. *Alabama Great Southern R. Co.*, 115 Ala. 181 (22 So. Rep. 449). A railroad company cannot defend against its liability

for injury resulting from its interfering with the flow of surface water, by showing that the injury has been aggravated by the negligence of another railroad company in the construction of its drains, where the former company could have prevented the injury by the proper construction of drains on its own right of way. *Shahan* v. *Alabama Great Southern R. Co.*, 115 Ala. 181 (22 So. Rep. 449). It is the duty of a railroad company when constructing its roadbed, where it forms a dam to obstruct the passage of surface water, to do so in such a firm and perfect manner, as to withstand the water which would accumulate against it in all ordinary storms, so as to guard against all damages to lower proprietors, which could be reasonably foreseen. *Borchsenius* v. *Chicago, St. P., M. & O. Ry. Co.*, 96 Wis. 448 (71 N. W. Rep. 884). Particular evidence held to show that a railroad company was not negligent in the construction of an embankment to restrain surface water. *Town* v. *Missouri Pac. Ry. Co.*, 50 Neb. 768 (70 N. W. Rep. 402). A railroad company which carelessly and negligently constructs its ditches along its track so as to cause the surface waters to collect and be precipitated upon the lands of another so as to destroy his crops and growing trees, is liable for damages resulting therefrom; and the measure of damages is the value of the crops and trees destroyed and the difference in the value of the land immediately before and after the making of injurious deposits thereon. *Fremont, E. & M. V. R. Co.* v. *Harlin*, 50 Neb. 698 (70 N. W. Rep. 268; 61 Am. St. Rep. 578; 36 L. R. A. 417). A railroad company constructing a spur track, at the request and for the convenience of an adjoining owner, will not be held liable to him for injuries resulting from such track interfering with the flow of surface water. *Shahan* v. *Alabama Great Southern R. Co.* 115 Ala. 181 (22 So. Rep. 449).

Sec. 890. Liability of municipalities. A city ordering the grading of a street up to the "official grade," is not liable for injuries resulting from the damming of surface water, which was caused by the errors of the city engineer, negligently made, in the performance of a duty imposed upon him by statute. *Sievers* v. *City and Co. of San Francisco*, 115 Cal. 648 (47 Pac. Rep. 687; 56 Am. St. Rep. 158). But a

municipal corporation is liable if it collects and gathers up surface water by artificial means, such as sewers and drains, and casts it upon the premises of another in increased and injurious quantities, *Robbins* v. *Village of Willmar*, 71 Minn. 403 (73 N. W. Rep 1097); *Clay* v. *City of St. Albans*, 43 W. Va. 539 (27 S. E. Rep. 368; 64 Am. St. Rep. 883); and it is liable for injuries by surface waters resulting from its improper construction of a municipal improvement. *McArthur* v. *City of Dayton*, Ky. (42 S. W. Rep. 843). In a recent case in which the authorities on the different phases of the subject are exhaustively collated, it is held that a city is not bound to furnish drains or sewers to relieve a lot of its surface water whether its own or that flowing from other premises; nor is it liable for mere surface water flowing from the street upon an adjoining lot, or for damages to a lot owner because a street improvement prevents surface water on the lot from flowing off of it, or increases the flow of surface water onto it, provided such increased quantity is not collected by artificial channels and cast in a mass or body upon the lot; and it is also held that W. Va. Const., art. 3, § 9, providing that private property shall not be taken or damaged for public use without just compensation, does not render a city liable for damages to property from surface water where a private individual would not be liable. *Jordan* v. *City of Benwood*, 42 W. Va. 312 (26 S. E. Rep. 266; 57 Am. St. Rep. 859; 36 L. R. A. 519). Substantially the same is held in *Yeager* v. *Town of Fairmont*, 43 W. Va. 259 (27 S. E. Rep. 234).

If a city or town negligently fails to keep its existing drains and gutters open and clear of obstructions, and in condition to carry off the water in them, and by reason thereof land is injured by their overflow, the city or town is liable in damages, provided the overflow is not due to an unusual or extraordinary storm or rainfall. *Clay* v. *City of St. Albans*, 43 W. Va. 539 (27 S. E. Rep. 368; 64 Am. St. Rep. 883). Citing, Elliott, Roads & S. 363; Jones, Neg. Mun. Corp. § 144; 1 Beach, Pub. Corp., §§ 764, 767; *Hitchins* v. *Mayor, etc.*, 68 Md. 100; *Gilluly* v. *City of Madison*, 68 Wis. 518 (24 N. W. Rep. 137; 52 Am. Rep. 299); *Weis* v. *City of Madison*, 75 Ind. 241 (39 Am. Rep. 135); 2 Dill. Mun. Corp., § 1051, cl. 4; *Nims* v. *Mayor, etc.*, 59 N. Y. 500; *Richmond*

v. *Long*, 17 Grat. 375, point 8. In Rhode Island it is held that a town is not liable for damages to abutting property, occasioned by surface water being turned thereon on account of a highway and its drainage being out of repair. *Murray* v. *Allen*, 20 R. I. 268 (38 Atl. Rep. 497). A complaint against a city for failure to erect an embankment to confine waters within a ditch or to dig it deeper, should allege not only the city's duty to take care of the ditch but also its duty to deepen it or make the embankments as well as its failure to do so. *City of Huntsville* v. *Ewing*, 116 Ala. 576 (22 So. Rep. 984).

TAXES AND TAX TITLES.

EPITOME OF CASES.

Sec. 891. Collateral inheritance tax. A collateral inheritance tax cannot be imposed on real estate situated in another state, although the decedent's will directs his executors to sell it at a specified future time. *In re Hadley's Estate*, 181 Pa. St. 339 (37 Atl. Rep. 587). The court say: "It is universally conceded that the tax cannot be laid directly, and nowhere is this rule laid down more positively than in our own cases. See *Bittinger's Estate*, 129 Pa. St. 338 (18 Atl. Rep. 132); *Com.* v. *Coleman's Adm'r*, 52 Pa. St. 468; *Drayton's Appeal*, 61 Pa. St. 172. And the collateral inheritance tax being a tax on the property passing from the decedent, and not a mere succession duty imposed on the recipient, *Bittinger's Estate* 129 Pa. St. 338 (18 Atl. Rep. 132), is within the defect of power to impose it on land outside of the state. The border line, however, is reached when property which is in fact real estate is to be treated as personalty, under the doctrine of equitable conversion. On this subject two conflicting views have been entertained by different courts. In *Custance* v. *Bradshaw*, 4 Hare 315, land was held by a partnership, and the interest of one partner who had died was sold to another partner. It was claimed that this interest was personalty, and liable to probate duty. But

Vice Chancellor Wigram held that conversion, being an equitable fiction, would only be carried to the extent necessary to accomplish the equitable result aimed at, and 'would not alter the nature of the property for the purpose only of subjecting it to fiscal claims to which at law it was not liable in its existing state.' More recent English cases have somewhat modified this decision so far as it relates to land held by partners for partnership purposes. See Dos P. Col. Inh. Taxes, § 46b, and 32 Am. Law Reg. (N. S.) 474, note by Mr. Howard W. Page. But the court of appeals of New York adopted the same view as late as 1893. *In re Swift*, 137 N. Y. 77 (32 N. E. Rep. 1096; 18 L. R. A. 709)—and *In re Curtis*, 142 N. Y. 219 (36 N. E. Rep. 887), where it was said: 'It was never intended by the law to tax a theory having no real substance behind it'; and quoting *In re Swift*, 137 N. Y. 77 (32 N. E. Rep. 1096; 18 L. R. A. 709), 'The question of taxation is one of fact, and cannot turn on theories or fictions.' In Pennsylvania, however, the other view was taken in *Miller* v. *Com.*, 111 Pa. St. 321 (2 Atl. Rep. 492), where it was held that, as the testator had peremptorily directed a sale of the land and the distribution of the proceeds, the doctrine of conversion applied, and the actual *situs* of the land was immaterial, as what passed under the will was not the land, but the proceeds, which were personalty, and liable to the tax. The same rule was followed in *Williamson's Estate*, 153 Pa. St. 508 (26 Atl. Rep. 246). These cases rest upon the basis that the testator intended and directed, not a merely nominal or limited conversion, but an actual conversion by sale, and the blending of the proceeds with his other personalty for purposes of administration under his will. The action of the court in dating such conversion from the instant of death was but the application of the general rule that what is to be done must be treated in equity as done already. Though this argument is severely technical, and therefore questionable in regard to jurisdiction to tax land in fact situated in another state, yet it has the merit of being unanswerably logical if the premise be once accepted. This court has followed the argument unswervingly to its logical conclusion, even when the result seemed contrary to the express legislative policy of the state. Thus, *In re Coleman's Estate*, 159 Pa. St. 231 (28

Atl. Rep. 137), where land in Pennsylvania was owned by a testator in New York, whose will made an equitable conversion, the logical corollary of *Miller* v. *Com.*, 111 Pa. St. 321 (2 Atl. Rep. 492), was accepted, and the land was held to have become personalty, and to follow the owner's domicile, and therefore not to be taxible here.

All our cases agree that the status of the property at the instant of death must govern the question of tax, both as to liability and amount. *Drayton's Appeal*, 61 Pa. St. 172; *Appeal of Mellon*, 114 Pa. St. 564 (8 Atl. Rep. 183); *Williamson's Estate*, 158 Pa. St. 508, 521 (26 Atl. Rep. 246). Where, therefore, the conversion is not imperative, but only permissive, and rests in the discretion of the executors or others, it does not become operative until the exercise of the discretion; and in the meantime the land retains its normal character. *Drayton's Appeal*, 61 Pa. St. 172; *Miller* v. *Com.*, 111 Pa. St. 321 (2 Atl. Rep. 492). For the same reasons, where the conversion, though imperative, is not in *praesenti*, but in *futuro*, it goes into effect only from the happening of the stipulated contingency. This brings us to the exact question now before us, and we find it expressly decided in the last case on the subject, *Hale's Estate*, 161 Pa. St. 181 (28 Atl. Rep. 1071). The testator left lands in Missouri to his wife for her life, and, upon her death, directed his executor to sell them, and invest the proceeds in mortgages in St. Louis, and pay the income therefrom to collaterals. It was held by the orphans' court of Philadelphia that the proceeds were not taxable, and the decision was affirmed. The auditing judge put his conclusion directly on the postponent of the conversion, and, though the court in banc referred to the additional circumstance that the proceeds were to be invested in mortgages in St. Louis, yet it is clear that was not a material point in the *ratio decidenti*. Mortgages, no matter what the *situs* of the land pledged, are personal property; and, if the conversion had been immediate, no direction as to the investment of the proceeds could have exempted them from the tax. The ground of the decision, which is the logical result of the principles adopted in all the preceding cases, is that the tax is assessable at the instant of death; and where the conversion is not referable to that same instant, as where it is to take place only

in the discretion of the executors, or, a *fortiori*, where it is postponed by the express direction of the testator, the land in the meantime retains its real character, and, being outside the state, is not subject to taxation. In the present case the testator postponed the sale for twenty years, and there was therefore no conversion when the tax upon the estate accrued. The assignments of error to the tax on the lands in Virginia and West Virginia are therefore sustained." A collateral inheritance tax statute has been adopted in California and Missouri. Cal. Laws 1899, p. 101; Mo. Laws 1899, p. 328. N. J. act May 15, 1894, concerning collateral inheritance tax has been supplemented by an additional provision, Laws 1898, p. 106.

Sec. 892. Exemption from taxes. Statutes exempting property from taxation are to be strictly construed. *Bloomington Cemetery Ass'n* v. *People*, 170 Ill. 377 (48 N. E. Rep. 905). The rule requiring a strict construction of a statute exempting property from taxation will not apply where such statute contains a positive direction as to the rule of construction which shall be applied to it. *Brown University* v. *Granger*, 19 R. I. 704 (36 Atl. Rep. 720; 36 L. R. A. 847). A general exemption from taxes does not include special assessments for local improvements. *City of Philadelphia* v. *Union Burial Ground Soc.*, 178 Pa. St. 533 (36 Atl. Rep. 172; 36 L. R. A. 263). The determination of an assessor that property is not so used as to entitle it to exemption from taxation is not conclusive. *Portland University* v. *Multnomah Co.*, 31 Or. 498 (50 Pac. Rep. 532). Particular case in which property is held not exempt from municipal taxation on account of being agricultural lands. *City of Lebanon* v. *Bevill*, Ky. (38 S. W. Rep. 872).

Sec. 893. Exemption from taxes—Public lands and public property. Public land is not subject to state taxation until a patent has issued or the purchaser has acquired a perfect equity. *Duncan* v. *Newcomer*, 9 S. Dak. 375 (69 N. W. Rep. 580). Where land has been certified by the secretary of the interior to a state and the state has patented the same to another, it is held that such certificate and patent operate to transfer the legal title, subject to be decreed to another who

subsequently shows himself to be entitled thereto, and the land is taxable after the date of such certification. *Iowa Railroad Land Co.* v. *Davis*, 102 Ia. 128 (71 N. W. Rep. 229). Applying Mass.Pub. Stat.. ch. 11, § 5, it is held that a specific statutory provision is not necessary to exempt from taxation property of a municipal corporation appropriated to public uses. *City of Somerville* v. *City of Waltham*, 170 Mass. 160 (48 N. E. Rep. 1092). Citing, *Wayland* v. *Commissioners*, 4 Gray 500; *Worcestor Co.* v. *Mayor, etc., of City of Worcestor*, 116 Mass. 198 (17 Am. Rep. 159); *Essex Co.* v. *City of Salem*, 153 Mass. 141 (26 N. E. Rep. 431); *Town of West Hartford* v. *Water Com'rs*, 44 Conn. 360; *City of Rochester* v. *Town of Rush*, 80 N. Y. 302; *People* v. *Board of Assessors*, 111 N. Y. 505 (19 N. E. Rep. 90); *Trustees of Public Schools* v. *City of Trenton*, 30 N. J. Eq. 667, 681; *Comm'rs* v. *Gaffney*, 34 N. J. L. 131; *State* v. *Hotaling*, 44 N. J. L. 347. Land purchased by a city for the purpose of obtaining gravel therefrom for the construction and repair of its streets is held for a public use and is exempt from taxation. *City of Somerville* v. *City of Waltham*, 170 Mass. 160 (48 N. E. Rep. 1092). N. J. Gen. Stat., p. 3320, pl. 200, exempting from taxes the property of a county, is held to exempt the property of a county held for the public use outside of the county, although acquired without specific authority of law. *Board of Chosen Freeholders* v. *Collins*, 60 N. J. L. 367 (37 Atl. Rep. 623). Wis. Rev. Stat. 1878, § 1038, and Laws 1874, ch. 184, exempting from taxation all property owned exclusively by any "county, city, village, town or school district," and property held by a city under a lease, do not exempt from taxation property in possession of a city under a contract giving it an option to purchase the same where it has not entered into any binding obligation to purchase. *City of Milwaukee* v. *Milwaukee Co.*, 95 Wis. 424 (69 N. W. Rep. 819).

Sec. 894. Exemption from taxes—School property — Property of churches and charitable institutions. A charter of a college empowering it to acquire real and personal property by way of endowment which exempts "the college estate" from all taxes, is held to exempt from taxation not only the ground and buildings of the college but also all

property held by it by way of endowment. *Brown University* v. *Granger*, 19 R. I. 704 (36 Atl. Rep. 720; 36 L. R. A. 847). Construing Mass. Stat. 1889, ch. 465, exempting real estate of a college when occupied by it or by its officers for the purposes for which it was incorporated, it is held that professors and instructors are officers of the college; but the statute does not exempt property owned by the college constituting a dwelling house which the officers occupy and control exclusively for private purposes and for which they pay rent to the college. *President of Williams College* v. *Assessors*, 167 Mass. 505 (46 N. E. Rep. 394). Under Neb. Comp. Stat., ch. 77, art. 1, § 2, all property used directly, immediately, and exclusively for school purposes is exempt from taxation. *Academy of the Sacred Heart* v. *Irey*, 51 Neb. 755 (71 N. W. Rep. 752). In order for a voluntary association to claim exemption from taxation, under Mich. Pub. Acts 1893, No. 206, § 7, subd. 4, it is not enough that one of its direct or indirect purposes or results is benevolence, charity, education, or the promotion of science, but it must be organized chiefly, if not solely, for one or more of these objects. *Attorney General* v. *Common Council*, 113 Mich. 388 (71 N. W. Rep. 632).

Wis. Rev. Stat., § 1038, exempting from taxation, all real property not exceeding ten acres, of any "religious, scientific, literary, or benevolent association, * * * necessary for the location and convenience of the buildings of such association," is held to exempt from taxation the amount of property belonging to a Roman Catholic religious order which is used for the location and operation of a hospital, in which all persons are received and treated with or without charge, according to the ability of the patient, the surplus revenues being loaned without interest to other similar associations and no dividends declared. *St. Joseph's Hosp. Ass'n* v. *Ashland Co.*, 96 Wis. 636 (72 N. W. Rep. 48). The court say: "The word 'benevolent' means, literally, 'well-wishing.' It is a word of larger meaning than 'charitable.' It has been well said that 'though many charitable institutions are very properly called "benevolent," it is impossible to say that every object of a man's benevolence is also an object of his charity.' *James* v. *Allen*, 3 Mer. 17; *Thomson's Ex'rs* v. *Norris*, 20 N. J. Eq. 489. How it can be doubted that this institution is

doing a benevolent work in the truest sense of the word we are unable to see. It is really the work of the good Samaritan. It is true that those who are able to pay do pay a very moderate weekly charge, but those who are unable to pay receive the same care for nothing. This does not render the work done any the less benevolent. Doubtless, if the hospital were absolutely free to all, it could not be operated. It is the very fact that pay is collected from those who can pay which enables the sisters to operate the hospital, and care for those who are too poor to pay. If this work be not benevolent work, especially in the great cities and in the newly-settled districts, then there will have to be a new meaning attached to the word 'benevolent.' It is impossible to know how many men without home and friends owe their very lives to the care received in this and similar hospitals, when no other place opened its doors to them. We entertain no doubt that the work of this association is a benevolent work. The care of the sick and wounded of all races and religions indiscriminately, with or without pay, according to the ability of the patient, must ever be one of the most genuine forms of benevolence. It breaths the truest love for unfortunate mankind. *City of Philadelphia* v. *Womans Christian Ass'n*, 125 Pa. St. 572 (17 Atl. Rep. 475); *County of Hennepin* v. *Brotherhood of Gethsemane*, 27 Minn. 460 (8 N. W. Rep. 595)."

Sec. 895. Exemption from taxes—Property of manufacturers and railroad property. La. Const., art. 207, construed and applied—exemption of property of manufacturers. *Moore* v. *City of New Orleans*, 48 La. 1452 (21 So. Rep. 90); *Nicholson* v. *Board of Assessors*, 48 La. 1570 (21 So. Rep. 167); *St. Landry Cotton Oil Co.* v. *McGee*, 49 La. 750 (22 So. Rep. 236). La. Const., art. 207, as amended by laws 1886, Act No. 92, construed and applied—exemption of manufacturing corporations. *Southern Chem. & Fer. Co.* v. *Board of Assessors*, 48 La. 1475 (21 So. Rep. 31). An electric light company is not a "manufacturing industry" within the meaning of an ordinance exempting such industries from taxation. *Frederick Elec. L. & P. Co.* v. *Frederick City*, 84 Md. 599 (36 Atl. Rep. 362; 36 L. R. A. 180).

Where a federal grant of a right of way through public lands to a railroad company provides that, "Said way is granted to said railroad company to the extent of one hundred feet in width on each side of said railroad where it may pass through the public domain, including all necessary grounds for station buildings, work shops, depots, machine shops, switches, side tracks, turntables and water stations; and the right of way shall be exempt from taxation within the territories of the United States," the exemption from taxation extends to all structures placed upon the right of way which are necessary to the operation of the railroad. Bantz, J., dissenting. *United States Trust Co.* v. *Atlantic & P. R. Co.*, 8 N. M. 673 (47 Pac. Rep. 725). Construing and applying N. J. Gen. Stat., p. 3332, exempting from local taxation railroad property, it is held that the actual uses to which lands owned by a railroad company are devoted are the tests by which it can be determined whether the same is exempt from local taxation, as lands used for railroad purposes; and it is the main uses to which it is actually devoted which are to be considered in order to determine this question. Where a railroad company uses a freight yard for the purpose of carrying on a private coal business upon its own account, with coal from its own mines, transported in its own cars to such yard, and then from such yard by the railroad company, through its own agents, sold to others in its own name and upon its own account, such yard so used is not properly retained or used for railroad purposes, and is locally taxable. *Delaware, L. & W. R. Co.* v. *Mayor of City of Newark*, 60 N. J. L. 60 (37 Atl. Rep. 629). In Pennsylvania, a machine shop of a railroad company used for making repairs necessary to carrying on its business is exempt from local taxation. *Western N. Y. & P. R. Co.* v. *Venango Co.*, 183 Pa. 618 (38 Atl. Rep. 1088). Mich. Pub. Laws 1891, No. 174, construed and applied—exemption of railroads. *Manistee & G. R. R. Co.* v. *Turner*, 115 Mich. 291 (73 N. W. Rep. 240). Mich. Pub. Acts 1893, No. 206, § 11, as amended by Pub. Acts 1895, No. 229; Pub. Acts 1893, No. 129, § 3, construed and applied—exemption of railroad property from general tax. *Auditor General* v. *Flint & P. M. R. Co.*, 114 Mich. 682 (72 N. W. Rep. 992).

Sec. 896. Exemption from taxes—Statutes construed. Ill. Const., art. 9, § 3, and Rev. Stat., ch. 120, § 2, exempting from taxation "all lands used exclusively as grave yards or grounds for burying the dead," do not exempt a lot adjacent to a cemetery inclosed with it, used as an entrance for the cemetery, and partly occupied by a dwelling house for the use of the superintendent of the cemetery grounds and by a well for their benefit. *Bloomington Cemetery Ass'n* v. *People*, 170 Ill. 377 (48 N. E. Rep. 905). Under Mich. Pub. Acts 1883, No. 129 (3 How. Ann. Stat., § 3718h) telephone companies are exempt from local taxes. *Attorney General* v. *Common Council*, 113 Mich. 388 (71 N. W. Rep. 632). For construction of § 251 of the charter of the city of Detroit, Mich., as to exemption from taxation of property held for water works purposes, see *Board of Water Com'rs* v. *Auditor General*, 115 Mich. 546 (73 N. W. Rep. 801). Miss. Laws 1858, p. 40, § 18; Laws 1867, pp. 237–248, construed and applied—exemption of lands from levee tax. *Owens* v. *Yazoo M. V. & R. Co.*, 74 Miss. 821 (21 So. Rep. 244). Construing Wash. Const., art. 7, §§ 1, 2, providing that "all property in the state not exempt under the laws of the United States or under this constitution shall be taxed in proportion to its value to be ascertained as provided by law; * * * the property of the United States and of the state, counties, school districts, and other municipal corporations, and such other property as the legislature may, by general laws provide, shall be exempt from taxation," it is held that the phrase "such other property" does not authorize the legislature to exempt from taxation private property. *State* v. *Daniel*, 17 Wash. 111 (49 Pac. Rep. 243).

Sec. 897. Assessment of taxes—General principles. A valid assessment of land is essential to a valid tax sale. *McKeown* v. *Collins*, 38 Fla. 276 (21 So. Rep. 103). A tax lien cannot be created against the tax payer's property except by strict compliance with the provisions of the statute by the officers who assess or levy the taxes. *Manistee & G. R. R. Co.* v. *Turner*, 115 Mich. 291 (73 N. W. Rep. 240). An assessment is void where the supposed statement of the valuation of the property is given in figures without the use of any

dollar or cents mark or any other sign to indicate the value or denomination of money. *Anderson* v. *Post*, Tenn. (38 S. W. Rep. 283). In Nevada it is held that an assessment of several parcels of land belonging to one person as one tract is void. *Peers* v. *Reed*, 23 Nev. 404 (48 Pac. Rep. 897). But it is held under the statute of Idaho, that two contiguous town lots owned by the same individual, may be jointly assessed and one valuation fixed for the two lots unless the owner demands a separate assessment. *Cooperative Sav. & L. Ass'n* v. *Green*, Idaho (51 Pac. Rep. 770). In Illinois it is held that land held and used as right of way by a railroad company, including the superstructures thereon, is railroad track, and not subject to assessment by the local assessor; and that land so held by a railroad company as right of way is required by law to be assessed for taxation by the state board of equalization, and that an assessment of such property by the local assessor is void. *Chicago, M. & St. P. Ry. Co.* v. *Grant*, 167 Ill. 489 (47 N. E. Rep. 750). In Kentucky it is held that an assessment of property for taxation in a town, made by the copying of the assessment made by the county assessor for state and county taxation, so far as it applies to persons and real estate within the limits of the town, is void, although authorized by an ordinance. *Turner* v. *Town of Pewee Valley*, 100 Ky. 288 (38 S. W. Rep. 143, 688). Pipes, hydrants and conduits of a water company are, for the purpose of taxation real estate, and taxable in the town or city where they are situated. *Inhabitants of Dover* v. *Maine Water Co.*, 90 Me. 180 (38 Atl. Rep. 101). Water, as an element, is not property any more than air; but when used, its potential power becomes actual by operating upon real estate, thereby giving it value, and that value is the basis of taxation. The assessment of this value must be made at the place where the power is applied and not at the location where the water is accumulated for that purpose. *Union Water-Power Co.* v. *City of Auburn*, 90 Me. 60 (37 Atl. Rep. 331; 60 Am. St. Rep. 240; 37 L. R. A. 651).

Sec. 898. Assessment of taxes—Statutes construed. Ala. Code 1886, §§ 453, 477, applied—assessment of leased timber land. *Freeman* v. *State*, 115 Ala. 208 (22 So. Rep.

560). Construing and applying Sand. & H. Ark. Dig., § 6401, providing that "The term 'real property and lands' wherever used in this act, shall be held to mean and include not only the land itself, whether laid out in town lots or otherwise, with all things thereon contained, but also all buildings, structures and improvements, and other fixtures of whatever kind thereon, and all rights and privileges belonging or in anywise appertaining thereto," it is held that buildings, machinery and fixtures owned by a lessee on leased lands are taxable as real property. *Union Compress Co.* v. *State*, 64 Ark. 136 (41 S. W. Rep. 52). Citing, *People* v. *Assessors of Town of Dunkirk*, 46 N. Y. 46. Cal. Const., art. 13, § 4, construed and applied—assessment of mortgaged real estate. *California Loan & T. Co.* v. *Weis*, 118 Cal. 489 (50 Pac. Rep. 697). Where two tracts of land are assessed, one being assessed to a named owner, but the other is not assessed to any owner or occupant or as unknown, as required by Florida Laws 1883, ch. 3413, §§ 6, 7, but the valuation of the two tracts are aggregated and the tax computed upon such aggregate valuation, such assessment is fatally defective and a tax deed based thereon is void. *McKoewn* v. *Collins*, 38 Fla. 276 (21 So. Rep. 103). Ga. Pol. Code, §§ 847, 858, 908, construed and applied—duty of tax receiver as to unreturned land—power of tax collector to issue a tax execution. *Norris* v. *Coley*, 100 Ga. 547 (28 S. E. Rep. 222). Ill. Rev. Stat., ch. 120, §§ 58, 191, providing that an assessment of railroad property shall not be illegal because made in the wrong name, are held to apply to special assessments. *Zeigler* v. *People*, 164 Ill. 531 (45 N. E. Rep. 965). How. Ann. Mich. Stat., § 3358, construed and applied—assessment of railroads by commissioner of railroads. *Manistee & G. R. R. Co.* v. *Turner*, 115 Mich. 291 (73 N. W. Rep. 240). Minn. Gen. Stat. 1894, § 1689, providing a commuted system of taxation of mining property and products by the payment of a fixed sum per ton for all ore mined and shipped or disposed of, is held unconstitutional. *In re Taxes Delinquent in St. Louis Co.*, 71 Minn. 283 (73 N. W. Rep. 970). Miss. Laws 1884, p. 14, applied—approval of assessment roll by board of supervisors. *Brothers* v. *Beck*, 75 Miss. 482 (22 So. Rep. 944). Under the statutes of Oklahoma, the listing of property by the owner for

taxation is not a prerequisite to a valid assessment. *Pentecost* v. *Stiles*, 5 Okla. 500 (49 Pac. Rep. 921). Hill's Ann. Or. Laws, § 2782, empowering county courts to correct errors in assessment rolls, does not allow them to strike property from rolls as exempt from taxation. *Portland University* v. *Multnomah Co.*, 31 Or. 498 (50 Pac. Rep. 532). Wis. Rev. Stat., §§ 1045, 1048, construed and applied—separate assessment of distinct parcels or lots of land. *Neu* v. *Voege*, 96 Wis. 489 (71 N. W. Rep. 880). Applying R. I. Pub. Stat., ch. 42, § 11, providing that personal property, for purposes of taxation, shall include "machines of all sorts propelled by steam," it is held that electric dynamos which are propelled by steam for the purpose of generating electricity for an electric plant, which may be easily removed from the real estate by the unscrewing of bolts, and an electric switch board with connecting wires used in connection with such plant which may be removed without injury to the realty, are personal property. It is also held that the wires and poles used for conveying electricity from such plant, some of which are set on private property and some on public highways are not fixtures to the lot on which the electric light is generated or appurtenant thereto, for the purpose of taxation as real estate although they cannot be assessed as personal property because they are not within the class of such property enumerated by the statute for taxation. *Newport Illuminating Co.* v. *Tax Assessors*, 19 R. I. 632 (36 Atl. Rep. 426; 36 L. R. A. 266).

Sec. 899. Assessment of taxes—In whose name assessment should be made. The assessment in the name of a joint owner with words additional to the name indicating clearly enough who are the other joint owners, is not an invalid assessment. *Hood* v. *City of New Orleans*, 49 La. 1461 (22 So. Rep. 401). An assessment in the name of a deceased person is void. La. Laws 1890, Act No. 106, construed and applied. *Cucullu* v. *Brakenridge Lum. Co.*, 49 La. 1445 (22 So. Rep. 409). But it is held that an assessment of property made in the assessment year of the owner's death, in his name and in existence when he died, will bind his heir and support a tax sale, under La. Laws 1884, Act No. 82 *Clifford* v. *Michener*, 49 La. 1511 (22 So. Rep. 811). An

assessment to "Henry Loose and to all owners and claimants known and unknown," is invalid, and a tax deed reciting such an assessment is void. *Z. Russ & Sons Co.* v. *Crichton*, 117 Cal. 695 (49 Pac. Rep. 1043). Where, by the terms of the lease, structures erected by the lessee are to become the property of the lessor upon the termination of the lease, for the purpose of taxation they will be treated as the property of the lessor from the time of their construction. Bartlett, J., dissenting. *People* v. *Barker*, 153 N. Y. 98 (47 N. E. Rep. 46). Under the tax laws of Maryland, a lessee of premises for 99 years is treated as owner for the purposes of taxation. *Textor* v. *Shipley*, 86 Md. 424 (38 Atl. Rep. 982).

Sec. 900. Assessment of taxes—Description of property. A tax sale based upon an assessment, which does not contain any description of the property, conveys no title. *Petit* v. *Flint & P. M. R. Co.*, 114 Mich. 362 (72 N. W. Rep. 238). Tex. Rev. Stat. 1895, art. 5076, prescribing the requisites of an assessment for state and county taxes, as to the description of the property, does not apply to assessments for city taxes. The description is sufficient when it furnishes the means by which property can be identified from the description itself or by the use of extrinsic evidence to apply that description to the property. *Eustis* v. *City of Henrietta*, 90 Tex. 468 (39 S. W. Rep. 567). Citing, *Morgan* v. *Smith*, 70 Tex. 641 (8 S. W. Rep. 528); *Law* v. *People*, 80 Ill. 268; *Fowler* v. *People*, 93 Ill. 116; *Woodside* v. *Wilson*, 82 Pa. St. 52; *Driggers* v. *Cassady*, 71 Ala. 529; *Judd* v. *Anderson*, 51 Ia. 345 (1 N. W. Rep. 677; *Allen* v. *Inhabitants of Woodbridge Tp.*, 42 N. J. L. 401. A description of property in the assessment roll as it is described in a partition and is on record, is sufficient. *Bristol* v. *Murff*, 49 La. 357 (21 So. Rep. 519). An assessment of lands properly designated according to an official plat is not invalidated by the fact that they are referred to as fractional lots. *Noyes* v. *King Co.*, 18 Wash. 417 (51 Pac. Rep. 1052). A description on an assessment roll as "lot frontage 78 feet, east side of Spring street between Third and Fourth streets, bounded north by Hunter, south by Morsch," was held void for indefiniteness and parol evidence was held inadmissible to ascertain what

particular tract or lot the assessor had in mind when making the assessment. *Harvey* v. *Meyer*, 117 Cal. 60 (48 Pac. Rep. 1014). A description as " V. C. N. E. Cedar & Tennessee," is insufficient. *Smith* v. *Cox*, 115 Ala. 503 (22 So. Rep. 78). Particular description held sufficient, *Hood* v. *City of New Orleans*, 49 La. 1461 (22 So. Rep. 401); insufficient, *Anderson* v. *Post*, Tenn. (38 S. W. Rep. 283).

Sec. 901. Assessment of taxes—Omission of property—Errors in valuation—Boards of equalization. Construing and applying Minn. Gen. Stat. 1894, § 1888, providing that in an application of the state for judgment for the amount of taxes levied against land, no omission of any of the things provided by law, etc., " shall be a defense or objection to the taxes appearing upon a piece or parcel of land unless it be also made to appear to the court that such omission has resulted to the prejudice of the party objecting, and that the taxes against such piece or parcel of land have been partially, unfairly and unequally assessed; and in such case, but no other, the court may reduce the amount of taxes upon such piece or parcel of land," it is held that if the assessment of a taxpayer's land is impartial, equal and fair, compared with the average valuation of other lands generally (except particularly omitted or undervalued tracts) in the same taxing district, the fact that certain particular properties have been intentionally and willfully omitted from the tax lists, or intentionally and willfully undervalued, is no defense, either partial or total, to such an application. *In re Taxes Delinquent in St. Louis Co.*, 71 Minn. 283 (73 N. W. Rep. 970). The omission to tax the town poor farm, the halls where town meetings are held, a small parcel of land on which the engine house stands, and the land on which the county court house stands, does not vitiate and make invalid the entire assessment of taxes made by the town. *Inhabitants of Dover* v. *Maine Water Co.*, 90 Me. 180 (38 Atl. Rep. 101). A statute (Minn. Gen. Laws 1893, ch. 151) which provides for the taxation of property undervalued or unlawfully omitted from assessment, and for reassessment, where there has been a gross undervaluation of such property, is constitutional. *In re Taxes for Itasca Co.*, 68 Minn. 353 (71 N. W. Rep. 265). See

opinion for extensive discussion of this question. An assessment of the improved real estate of a railroad in excess of the cost of reproducing such property in the condition existing at the time of the assessment, based upon an estimate of its value, as a part of a valuable railroad line by considering the cost, rentals and earnings of the entire line, is erroneous. *People* v. *Clapp*, 152 N. Y. 490 (46 N. E. Rep. 842; 39 L. R. A. 287). Under Hill's Ann. Or. Laws, §§ 2778, 2779, the board of equalization has power to increase or decrease valuations, to correct an assessment if property is assessed more than once or in the name of a person not the owner; to add to the roll property omitted by the assessor; but it has no power to determine whether property is exempt from taxation. *Portland University* v. *Multnomah Co.*, 31 Ore. 498 (50 Pac. Rep. 532).

Sec. 902. Priority of lien for taxes—Personal property taxes—Apportionment of tax lien to aid other lienholders. A lien for taxes has priority over a vendor's lien acquired before they were assessed. *Thomas* v. *Jones*, 94 Va. 756 (27 S. E. Rep. 813). The same is true as to judgment liens. *Commonwealth* v. *Ashlin's Admr*, 95 Va. 145 (28 S. E. Rep. 177). In North Corolina, it is held that a mortgagee's lien is subject to the lien for taxes and that he must pay them if the mortgagor does not, and that he is barred by a sale of the land for taxes without notice from the sheriff. Acts 1891, ch. 326, § 78, applied. *Powell* v. *Sikes*, 119 N. C. 231 (26 S. E. Rep. 38). Conn. Gen. Stat., 3890, 3896, do not make a limitation of the time beyond which a tax cannot be collected from a tax debtor, but fix the time beyond which the tax lien shall not have precedence over other liens. *White* v. *Town of Portland*, 68 Conn. 293 (36 Atl. Rep. 46).

Applying Iowa Code, § 865, which makes taxes assessed on personalty a lien on the land of the persons assessed, it is held that such lien is subject to previous mortgage liens. Given, J., dissenting. *Bibbins* v. *Polk Co.*, 100 Ia. 493 (69 N. W. Rep. 1007). Following, *Bibbins* v. *Clark*, 90 Ia. 230. See Ballards' Law of Real Property, Vol. III, §§ 722–726. Applying Cal. Pol. Code, §§ 3716, 3717, 3788, it is held that the lien for one's personal property tax is superior to that of a

prior mortgage on the land. *California Loan & T. Co.* v. *Weis*, 118 Cal. 489 (50 Pac. Rep. 697). Under S. Dak. Laws 1891, ch. 14, §§ 96, 100, a lien for taxes upon personal property cannot be enforced against the real estate of the owner, until the county treasurer makes his return showing that he is unable to find personal property with which to satisfy such taxes; and a sale made in violation of this statute is invalid as against a prior mortgagee of the land. Under § 115, such a mortgagee may redeem from such a sale without paying the mortgagor's personal taxes. *Buell* v. *Boylan*, 10 S. Dak. 180 (72 N. W. Rep. 406).

Where two creditors of a common debtor who is insolvent, each has, relatively to the other, the highest lien upon distinct parcels of real estate belonging to such debtor, and there are outstanding, against the latter, tax executions issued generally against him in *personam*, and binding both parcels of the realty, the burden of discharging the liens of these executions should as a general rule, upon equitable principles, be apportioned between the two lien creditors, by making each of the two pieces of property liable ratably for its proportion of the whole amount of the taxes, according to the respective valuations at which the property was assessed and returned for taxation. *Brooks* v. *Matledge*, 100 Ga. 367 (28 S. E. Rep. 119).

Sec. 903. Lien for taxes—Statutes construed. Where proceedings to levy drainage assessments are had in the proper court under a statute (Ind. Laws 1883, p. 173, § 1), giving it jurisdiction over the land described in the petition "and power to fix a lien thereon if they are described as belonging to the person who appears to be the owner according to the last tax duplicate or record of transfer kept by the auditor of the county where the same is situate," a lien may be decreed against the land, as against the actual owner, although his name does not appear on the records. *Reed* v. *Kalfsbeck*, 147 Ind. 148 (45 N. E. Rep. 476). Applying S. Dak. Laws 1891, ch. 14, § 96, which makes taxes upon real property a "perpetual lien thereupon," it is held that when a sale of land for taxes is made and the property bid in by the county, the lien of the county is not thereby extinguished. *Rochford* v. *Fleming*, 10

S. Dak. 25 (71 N. W. Rep. 817). In Tennessee it is held that taxes on land are a personal debt of the person whose duty it is to pay them and that an assessment against a life tenant gives only a lien upon the life estate, and if this estate terminates before the payment of taxes or final decree for their enforcement, the lien and taxes are lost. *State* v. *Campbell*, Tenn. (41 S. W. Rep. 987). But under Mill. & V. Tenn. Code, § 806, when land is sold under a decree of foreclosure, it is the duty of the court to ascertain the amount of taxes which are a lien thereon, and provide for their payment out of the proceeds of the sale without reference to whether they were assessed before or after the mortgage lien attached. *Dunn* v. *Dunn*, 99 Tenn. 598 (42 S. W. Rep. 259). Applying Va. Code, § 674, it is held that § 686, limiting liens for taxes generally to a period of five years, does not affect the lien of the city of Richmond on real estate for taxes, given it by the provisions of its charter. *Powell's Ex'r* v. *City of Richmond*, 94 Va. 79 (26 S. E. Rep. 389).

Sec. 904. Publication of delinquent lists—Notice of tax sale. Statutes requiring the publication of notices affecting the assessment or sale of property for taxes, will be construed to require their publication in the English lauguage, *Turner* v. *Hutchinson*, 118 Mich. 245 (71 N. W. Rep. 514). Cal. Pol. Code, § 3764, construed and applied—contents of delinquent list, *California Loan & T. Co.* v. *Weis*, 118 Cal. 489 (50 Pac. Rep. 697). A recital in a tax deed that the delinquent list published gave "such a condensed description of the property that it might be easily known," does not on its face show a noncompliance with Cal. Pol. Code, §§ 3760, 3764, 3765. *Rollins* v. *Woodman*, 117 Cal. 516 (49 Pac. Rep. 455). Cal. Pol. Code, §§ 3764, 3768, 3797, 3800; Stat. 1891, p. 449, construed and applied—date on which tax collector makes his final report and turns over delinquent list. *California Loan & T. Co.* v. *Weis*, 118 Cal. 489 (50 Pac. Rep. 697).

In order for the notice of a tax sale to be sufficient under Mills' Colo. Stat., § 3884, it must not only appear that it was published in a proper newspaper for the requisite time, but the affidavit of publication must show "that copies of each num-

ber of said paper in which said notice and list were published, were delivered by carriers or transmitted by mail to each of the subscribers of said paper." *Charlton* v. *Kelly*, 24 Colo. 273 (50 Pac. Rep. 1042). Citing, *Rustim* v. *Merchants' & Miners' Tunnel Co.*, 23 Colo. 351 (47 Pac. Rep. 300). An affidavit of the publication of a notice of a tax sale must contain all the facts which the statute requires it to show, and its contents cannot be supplemented by parol evidence. Mills' Ann. Colo. Stat., §§ 3884, 3885, construed and applied. *Rustin* v. *Merchants' & Miners' Tunnel Co.*, 23 Colo. 351 (47 Pac. Rep. 300). Citing, *Martin* v. *Barbour*, 140 U. S. 634 (11 Sup. Ct. Rep. 944); *Gibney* v. *Crawford*, 51 Ark. 34 (9 S. W. Rep. 309); *Martin* v. *Allard*, 55 Ark. 218 (17 S. W. Rep. 878). The publication of a notice in a Sunday newspaper is void. *Schwed* v. *Hartwitz*, 23 Colo. 187 (47 Pac. Rep. 295; 58 Am. St. Rep. 221). Baltimore City Code 1879, art. 49, § 5, construed and applied—notice of tax sale. *Textor* v. *Shipley*, 86 Md. 424 (38 Atl. Rep. 932). N. Y. Laws 1892, ch. 410, applied—notice of tax sale. *Clason* v. *Baldwin*, 152 N. Y. 204 (46 N. E. Rep. 322.)

Sec. 905. Tax sale—Exhausting personal property. Under Ill. Rev. Stat., ch. 120, § 255, providing that the "tax on personal property shall not be charged against real property, except in case or removals, or where said tax cannot be made out of the personal property," it is held that where the personal property has not been removed, real estate cannot be sold for a tax on it, where the only effort to collect it off of the the personal property was a mere demand for payment. *Mt. Carmel L. & W. Co.* v. *People*, 166 Ill. 199 (46 N. E. Rep. 722). Under S. C. Tax Act 1891, real estate could not be sold until the personal property of the delinquent had been exhausted, but a *bona fide* purchaser of real estate at a tax sale is not affected by a false return of the officer showing that he had exhausted the personal property of the delinquent. *Interstate Bldg. & Loan Ass'n* v. *Waters*, 50 S. C. 459 (27 S. E. Rep. 948).

Sec. 906. Tax sale—Sale in parcels or in solido. In Colorado the sale of noncontiguous tracts, *en masse*, for a gross

sum is void. *Emerson* v. *Shannon*, 23 Colo. 274 (47 Pac. Rep. 302; 58 Am. St. Rep. 282). A tax deed which recites the sale of a large number of noncontiguous lots, *en masse*, is void, but the fact that the numbers of the lots in a deed conveying several lots are not consecutive does not show that they are not contiguous. *Crisman* v. *Johnson*, 23 Colo. 264 (47 Pac. Rep. 296; 58 Am. St. Rep. 224). Under La. Const. art. 210, whenever the property can be conveniently offered in less quantity than the entire tract, it is the imperative duty of the officer so to offer it. *Bristol* v. *Murff*, 49 La. 857 (21 So. Rep. 519). Where three separate tracts of land, two consisting of forty acres each and one of sixty acres, were each separately offered and sold for the amount of tax due on each, the officer making no effort to realize the entire tax from a portion of the land, it is held under the statute of Mississippi that the sale was void. *Gregory* v. *Brogan*, 74 Miss. 694 (21 So. Rep. 521).

Sec. 907. Who may purchase at a tax sale. A mortgagor cannot suffer the premises to be sold at a tax sale and by purchase thereat, assert title against his mortgagee. *Interstate Bldg. & Loan Ass'n* v. *Waters*, 50 S. C. 459 (27 S. E. Rep. 948). The grantee of a mortgagor, who has covenanted to pay the taxes on the mortgaged premises, whether he is the immediate or remote grantee, or whether he gets his title by deed or through a second mortgage, is disqualified from acquiring and holding a tax title to the mortgaged premises, as against the mortgagee. *American Baptist Missionary Union* v. *Hastings*, 67 Minn. 303 (69 N. W. Rep. 1078). One who stands in the mere relation of mortgagee is under no obligation to pay taxes on the mortgaged premises, nor is he precluded from acquiring a tax title thereto, based on tax sales made before he went into possession of the premises. *McLaughlin* v. *Acom*, 58 Kan. 514 (50 Pac. Rep. 441). A husband, while in joint occupancy of his wife's land with her, cannot acquire a valid tax title to it as against her. *Ward* v. *Nestell*, 113 Mich. 185 (71 N. W. Rep. 593).

Sec. 908. Title and rights of purchaser at a tax sale. A purchaser at a tax sale takes only the interest of the person

against whom the land is assessed. *Anderson* v. *Post*, Tenn. (88 S. W. Rep. 283). The title of a purchaser only relates back to the time when he complied with the statutory requirements entitling him to a deed. *Palmer* v. *Frank*, 169 Ill. 90 (48 N. E. Rep. 426). A purchaser at a tax sale has not even a *prima facie* right to the land purchased by him or its possession, until the execution and delivery of the deed thereto. *Spaulding* v. *Ellsworth*, 39 Fla. 76 (21 So. Rep. 812). N. J. Gen. Stat., Vol. 3, p. 3370 ("Martin Act") construed and applied—rights of purchaser and mortgagee. *Burgin* v. *Rutherford*, 56 N. J. Eq. 666 (38 Atl. Rep. 854).

Sec. 909. Rights of purchaser at invalid tax sale—Statutes construed. A purchaser at an invalid tax sale is entitled to be subrogated to the lien of the state to the extent of the amount thereof discharged by the money paid by him. *Reed* v. *Kalfsbeck*, 147 Ind. 148 (45 N. E. Rep. 476). A purchaser of a tax title which is subsequently declared invalid is entitled to recover from the true owner, taxes which he paid in good faith. *Reid* v. *Yazoo & M. V. R. Co.*, 74 Miss. 769 (21 So. Rep. 745). In the absence of a statutory provision giving indemnity to purchasers at tax sales, such purchasers under the rule of *cavat emptar* take tax titles with full notice of any and all defects in the tax proceedings which may render their titles voidable or void, and if the titles so acquired are set aside by the courts, the purchasers are remediless. *Iowa & Dakota Land Co.* v. *Barnes Co.*, 6 N. Dak. 601 (72 N. W. Rep. 1019); *Van Nest* v. *Sargent Co.*, 7 N. Dak. 189 (73 N. W. Rep. 1083). Cal. Pol. Code, § 3804, authorizing the refundment by the county treasurer of "taxes erroneously or illegally claimed," does not authorize a recovery by a purchaser at a tax sale who paid the tax, where the land was exempt from taxation as the property of the United States. *Brooks* v. *Tulare Co.*, 117 Cal. 465 (49 Pac. Rep. 469). Construing Minn. Gen. Stat. 1894, § 1610, which provides that when a tax sale is declared void by a judgment of the court, stating for what reason the sale is annulled, the amount paid to the state at the tax sale or for the tax title shall be refunded with interest thereon, it is held that the statute does not apply where the trust relation between the parties pur-

chasing the tax title and the owner of the land are such that the purchase is merely a payment of the taxes; nor will refundment be made to a purchaser who failed to assert a title on which he could have prevailed in the action in which the judgment declaring the tax sale void was entered, and the facts show that he dealt with the state in bad faith. *Easton* v. *Schofield*, 66 Minn. 425 (69 N. W. Rep. 326). Although lands embraced in a tax sale are exempt from taxation, a county is not liable under N. Dak. Laws 1897, ch. 126, § 88, for the amount paid on the sale and the taxes subsequently paid by the purchaser, until the sale has been adjudged void. *Van Nest* v. *Sargent Co.*, 7 N. Dak. 139 (73 N. W. Rep. 1083). N. Dak. Comp. Laws, § 1629, which gives a purchaser at a tax sale the right to recover the amount of his bid with interest, "when by mistake or the wrongful act of the treasurer land has been sold on which no tax was due at the time," does not apply to a sale made under a description subsequently held to be void, where such description of the land was placed on the assessment roll and tax list of the county by other officials of the county, who were responsible for the description and by them delivered to the treasurer. *Iowa & Dakota Land Co.* v. *Barnes Co.*, 6 N. Dak. 601 (72 N. W. Rep. 1019). Wis. Rev. Stat., § 1184, which gives the purchaser at a void tax sale the right to have the money paid by him refunded with interest, relates only to lands sold for the nonpayment of general taxes, and has no reference to the sale of lands for nonpayment of assessments for local improvements. *Heller* v. *City of Milwaukee*, 96 Wis. 184 (70 N. W. Rep. 1111).

Sec. 910. Tender and payments required of one recovering land from the holder of an invalid tax title—Constitutionality and construction of statutes. A statute (Tex. Rev. Stat. 1895, art. 518), requiring as a condition precedent to the recovery by the owner of property sold at a void tax sale, his payment of all taxes due, is unconstitutional. *Eustis* v. *City of Henrietta*, 90 Tex. 468 (39 S. W. Rep. 567). Citing, Cooley, Const. Lim., pp. 453, 454; *Weller* v. *City of St. Paul*, 5 Minn. 95 (Gil. 70); *Taylor* v. *Miles*, 5 Kan. 498 (7 Am. Rep. 558); *Lassitter* v. *Lee*, 68 Ala. 287; *Baker* v. *Kelley*, 11 Minn. 495 (Gil. 358); *Groesbeck* v. *Seeley*,

18 Mich. 848; *Hart* v. *Henderson*, 17 Mich. 218; *Wright* v. *Cradlebaugh*, 8 Nev. 341; *Wilson* v. *McKenna*, 52 Ill. 44; *Reed* v. *Tyler*, 56 Ill. 288; *Dunn* v. *Snell*, 74 Me. 22. A statute (Wis. Laws 1883, ch. 278) requiring one who seeks to assail the title of the state to lands conveyed to it by any county for nonpayment of taxes, to pay into the county treasury certain taxes and costs to abide the event of the suit, is constitutional. A failure to comply with the statute must be taken advantage of by plea in abatement, where it does not appear on the face of the complaint. *Lombard* v. *McMillan*, 95 Wis. 627 (70 N. W. Rep. 678). But in Maine it is held, that Rev. Stat., ch. 6, § 205, as amended by Stat. 1895, ch. 70, § 11, requiring the owner of land sold for nonpayment of taxes to deposit with the clerk of the court the amount of all taxes, interest and costs accrued up to that time, before he can be admitted to test the validity of the taxes or sale, is unconstitutional. *Bennett* v. *Davis*, 90 Me. 102 (37 Atl. Rep. 864). The court say: "While the legislature may regulate the use of legal remedies, may require the payment of various fees, and may require security to be given for fees and costs, the requirement of this statute is not within either category. This requirement practically, is that, before he 'begins' his action or his defense, he shall pay into court the whole sum claimed against him, including interest and costs. With such an obstacle placed in his way by the legislature, the citizen cannot be truly said to have remedy by due course of law, or to have right and justice administered to him freely and without sale. As well might the legislature undertake to enact that no defendant shall begin his defense until he pays into court the whole sum demanded of him. It is not what has been done, or ordinarily would be done, under a statute, but what might be done under it, that determines whether it infringes upon the constitutional right of the citizen. The constitution guards against the chances of infringement. It is evident that under this statute the citizen might in some cases be practically deprived of all remedy."

Where one seeking to recover land held under a tax title, offers to pay the defendant all taxes, penalties, interest and costs paid by him on the property and obtains final judgment in his favor by reversal upon appeal, the lower court should

give the defendant an opporttunity to have the amount due him determined. *Herrick* v. *Niesz*, 18 Wash. 132 (51 Pac. Rep. 346). Where a defendant in ejectment claims under a tax deed, the plaintiff cannot recover without tendering taxes, penalties, interests and costs paid by the defendant, as required by Wash. Laws 1888, ch. 22 (Hill's Code, Vol. 2, §§ 676-678). *Ward* v. *Huggins*, 16 Wash. 530 (48 Pac. Rep. 240). Where, in an action by a purchaser at a tax sale to quiet title, a defendant asks the cancellation of the tax deed, he must, as a condition of having granted to him the relief prayed, pay the taxes justly chargeable against the property which have been payed by the plaintiff. *Browne* v. *Finlay*, 51 Neb. 465 (71 N. W. Rep. 34). Sand. & H. Ark. Dig., § 2595, construed and applied—tender of taxes required of one recovering land sold for taxes. *Trigg* v. *Ray*, 64 Ark. 150 (41 S. W. Rep. 55). Mill's Ann. Colo. Stat., § 3904, requiring one who recovers land sold for taxes to pay the value of improvements made and all taxes paid after the sale, applies to a void sale. *Crisman* v. *Johnson*, 23 Colo. 264 (47 Pac. Rep. 296; 58 Am.. St. Rep. 224). Mills' Ann. Colo. Stat., §§ 3904, 3905, construed and applied—computation of amount due to purchaser upon recovery of land by the owner—conditional decree. *Charlton* v. *Kelley*, 24 Colo. 278 (50 Pac. Rep. 1042). S. Dak. Comp. Laws, §§ 1640, 1643, construed and applied—tender and payment required of owner setting aside sale. *Salmer* v. *Lathrop*, 10 S. Dak. 216 (72 N. W. Rep. 570).

Sec. 911. Irregularities sufficient to avoid or invalidate a tax sale. A tax sale made in 1887 under the Arkansas Revenue Act of 1883, is void where the fee for the certificate of purchase was made a part of the costs to be included in the bid. *Darter* v. *Houser*, 63 Ark. 475 (39 S. W. Rep. 358). Cal. Pol. Code, § 3773, applied—particular recitals in a tax deed held insufficient to show an irregular offering of the property for sale. *Rollins* v. *Woodman*, 117 Cal. 516 (49 Pac. Rep. 455). Statutes fixing the place at which tax sales must be made are mandatory, and a failure to comply with their provisions renders the sale void. Colo. Gen. Laws 1877, § 2307, applied. *Crisman* v. *Johnson*, 23 Colo. 264 (47 Pac.

Rep. 296; 58 Am. St. Rep. 224). Under Mills' Ann. Colo. Stat., § 3888, the county treasurer cannot bid off property for the county without first offering and re-offering the same to private bidders. *Charlton* v. *Kelly*, 24 Colo. 278 (50 Pac. Rep. 1042). Under Ia. Code 1878, § 845, the failure of the treasurer to note on the tax books opposite each parcel of land the year or years for which taxes remain due and unpaid, will invalidate a sale. *Smith* v. *Callanan*, 103 Ia. 218 (72 N. W. Rep. 518). Under Kan. Gen. Stat. 1889, par. 6957, it is held that a tax deed including a fee for printing the sale notice is voidable if the printer's affidavit of the publication is not transmitted to the county treasurer within fourteen days after the last publication, although it was transmitted to and filed in the office of the county clerk within that time. *Douglas* v. *Craig*, 58 Kan. 814 (48 Pac. Rep. 917). Citing, *Douglas* v. *Walker*, 57 Kan. 328 (46 Pac. Rep. 318). Where four-tenths of a lot were sold for taxes levied against the whole lot, a tax-deed reciting that four-tenths was subject to taxation and that it was sold for the amount of taxes levied on it, but the amount of taxes recited in the deed was the amount levied against the whole lot, the deed is voidable. *York* v. *Barnes*, 58 Kan. 478 (49 Pac. Rep. 596). Where a sheriff's return of a tax sale contains nothing to show that the amount bid was the sum of the judgment and costs and that the sale of the whole parcel was necessary to raise such amount, it reports a void sale, and such return cannot be amended after a delay of thirteen years. *McGrath* v. *Wallace*, 116 Cal. 548 (48 Pac. Rep. 719). A sale of land by a description which is void for uncertainty is void; and so is a sale of lands which were offered by the officer in forty-acre lots, where he failed to designate each lot as he offered it for sale. *Nelson* v. *Abernethy*, 74 Miss. 164 (21 So. Rep. 150). A statute (Miss. Code 1892, § 3813) providing that "no error in conducting the sale shall invalidate it," does not have the effect to cure a total departure from the manner of selling, prescribed by law. *Nelson* v. *Abernethy*, 74 Miss. 164 (21 So. Rep. 150). Under N. J. Gen. Stat., Vol. 8, p. 3356, § 6, the return of a warrant for sale of lands for delinquent taxes, made by a collector of taxes of a borough, which return is not accompanied with a copy of the required notice

of such sale, or with proof that it was published, posted, and mailed as required by law, is fatally defective. *Landis* v. *Borough of Vineland*, 60 N. J. L. 271 (37 Atl. Rep. 1099). In the case of a tax sale of land in Salt Lake City, Utah, where it appears that the description of the deed does not correspond with all its immediate antecedents, where the recitals in the deed are not true, and do not correctly describe the land referred to in the notice of sale upon which the deed depended, and where the description in the notice of sale is erroneous and does not correctly describe the property of the defendant, nor the property described in the tax sale and it does not affirmatively appear from the notice of sale, that notice was given defendant of the amount of taxes assessed against him, or when or where the same were payable, as provided by § 8, p. 276, Rev. Ord. Salt Lake City, and § 2030, p. 53, Sess. Laws 1890; and where it appears the property was sold for $10.20 more than the amount of taxes, but nowhere appears what the $10.20 was for, or what became of it, and it nowhere appears how much the costs of the sale were, except that the deed recites the fact that the land was sold for $59.20, it is held that such tax sale is illegal. *Eastman* v. *Gurrey*, 15 Utah 410 (49 Pac. Rep. 310). Overruling *Hamer* v. *Weber Co.*, 11 Utah 1 (37 Pac. Rep. 741); *Ogden City* v. *Hamer*, 12 Utah 337 (42 Pac. Rep. 1113); *Olsen* v. *Bagley*, 10 Utah 492 (37 Pac. Rep. 739). Particular case in which the validity of a tax sale is assailed on account of confusion in the assessment and description of the land as seated and unseated. *Everhart* v. *Nesbitt*, 182 Pa. St. 500 (38 Atl. Rep. 525).

Sec. 912. Irregularities insufficient to invalidate a tax sale. Where the aggregate amount of tax is correctly stated, the sale will not be held irregular on account of the failure of the tax execution to specify the amount of tax for each separate fund. *Interstate Bldg. & Loan Ass'n* v. *Waters*, 50 S. C. 459 (27 S. E. Rep. 948). Under Mich. Laws 1893, p. 399, § 99, a tax sale will not be held invalid on account of irregularities which do not prejudice the property rights of the owner. *Turner* v. *Hutchinson*, 113 Mich. 245 (71 N. W. Rep. 514). See opinion for application of statute

to particular facts. The certificate of sale for taxes required by Okla. Stat. 1893, §§ 5657, 5663, to be executed by the county treasurer on making the sale is for the benefit and protection of the purchaser whether he be an individual or the county, and the failure of the treasurer to make and execute this certificate in no way affects the validity of the sale which may be proven by other evidence. *Pentecost* v. *Stiles*, 5 Okla. 500 (49 Pac. Rep. 921).

Sec. 913. Setting aside tax sales—Practice. Iowa Code, § 897, proving that "no person shall be permitted to question the title acquired by a treasurer's deed without first showing that he, or the person under whom he claims title, had title to the property at the time of the sale, or that title was obtained from the United States or this state after the sale," applies to a suit brought by the state to question a tax title claimed under a deed regular on its face. *State* v. *Havrah*, 101 Ia. 486 (70 N. W. Rep. 618). For further construction of this statute, see *McQuity* v. *Doudna*, 101 Ia. 144 (70 N. W. Rep. 99). One who has no title to land cannot enjoin a tax sale of it although he has made payment of taxes on it. *Broderick* v. *Allamakee Co.*, 104 Ia. 750 (73 N. W. Rep. 884). The comptroller of the state of New York has no power to set aside a sale of land to the state for taxes on the application of the owner. *People* v. *Roberts*, 151 N. Y. 540 (45 N. E. Rep. 941). A defendant cannot be required to pay costs of an action to set aside a tax deed, where no tender of the amount of taxes was made before the costs were incurred. *Glos* v. *Beckman*, 168 Ill. 74 (48 N. E. Rep. 69). A nonresident owner, having no knowledge of a void sale of his property for taxes, is not estopped to question such sale because the purchaser has made improvements without objection from him. *Petit* v. *Flint & P. M. R. Co.*, 114 Mich. 362 (72 N. W. Rep. 238). Mich. Acts 1889, No. 195, § 62 (3 How. Ann. Stat., § 1170gl) construed and applied—sale of lands—bidding in of land not sold for the state—right of owner to set aside sale. *Hilton* v. *Dumphey*, 113 Mich. 241 (71 N. W. Rep. 527). Mich. Acts 1893, No. 206, § 75, construed and applied—parties to proceedings to vacate tax sale

—notice to auditor general. *Greenley* v. *Hovey*, 115 Mich. 504 (73 N. W. Rep. 808).

Sec. 914. Redemption from tax sale. Redemption statutes are to be liberally construed. *Bucll* v. *Boylan*, 10 S. Dak. 180 (72 N. W. Rep. 406); *Henry* v. *Florida Land & Mortg. Co.*, 38 Fla. 269 (21 So. Rep. 19). The last case holds that a redemption can be made at a place other than that provided for by the statute if the holder of the tax sale certificate consents. Fla. Laws 1883, ch. 3413, construed and applied. A statute (Fla. Acts 1891, ch. 4011), extending the period allowed by a former statute for redemption, is unconstitutional as to sales made before its passage, *State* v. *Bradshaw*, 39 Fla. 137 (22 So. Rep. 296); and the same is true of a statute (Cal. Stat. 1895, p. 209, amending Political Code, § 3817), making the conditions of redemption more onerous. *Teralta Land & Water Co.* v. *Shaffer*, 116 Cal. 518 (48 Pac. Rep. 613; 58 Am. St. Rep. 194). Where,on account of his mistake in the description of the property and by his suggestions or directions,a landowner redeems the wrong piece of property from a tax sale, he must suffer the consequences. *Browne* v. *Finlay*, 51 Neb. 465 (71 N. W. Rep. 34). A landowner cannot maintain an equitable action to redeem his land from a tax sale on the ground that his tender of payment of the taxes was refused, because the officer erroneously believed that they had been previously paid, where such owner knew of the tax sale for the nonpayment of such taxes before the expiration of the time given for redemption and failed to redeem. *Easton* v. *Doolittle*, 100 Ia. 374 (69 N. W. Rep. 672). Construing Wash. Laws 1893, p. 370, §§ 105–135, providing for the forfeiture to the county of lands offered for sale for delinquent taxes which are not sold for want of bidders and for their subsequent sale, it is held that forfeiture to the county is not a sale, and where the county sells lands so forfeitured and issues a certificate of purchase the time for redemption runs from the date of such certificate and not from the date of the forfeiture. *State* v. *Maple*, 16 Wash. 480 (47 Pac. Rep. 966). *Doudna* v. *Harlan*, 45 Kan. 484 (25 Pac. Rep. 883), distinguished. Supp. Mass. Pub. Stat. 1883, ch. 223, § 1, construed—jurisdiction of

superior court of equity—bill to redeem from tax sale. *Barker* v. *MacKay*, 168 Mass. 76 (46 N. E. Rep. 412).

Sec. 915. Notice of expiration of time for redemption. A notice which is so indefinite that it is impossible to tell when the time to redeem expires, is defective. *Clason* v. *Baldwin*, 152 N. Y. 204 (46 N. E. Rep. 822). Cal. Pol. Code, § 3785, construed and applied—service by purchaser at tax sale of notice on the owner of the property of the purchaser's intention to apply for a deed—sufficiency of affidavit of service. *Simmons* v. *McCarthy*, 118 Cal. 622 (50 Pac. Rep. 761). Construing Ia. Code 1873, § 894, providing that "After the expiration of two years and nine months after the date of sale of the land for taxes, the lawful holder of the certificate of purchase may cause to be served upon the person in possession of such land, * * * and also upon the person in whose name the same is taxed in the manner provided by law for the service of original notices, a notice; * * * and until ninety days after the service of said notice, the right of redemption from such sale shall not expire," it is held that the notice should be served on the person in whose name the property is taxed, at the time the notice is in fact given, and not on the person to whom it is taxed at the end of two years and nine months from the sale. *Smith* v. *Callanan*, 103 Ia. 218 (72 N. W. Rep. 513). For further construction of this statute, see *Crawford* v. *Liddle*, 101 Ia. 148 (70 N. W. Rep. 97); *McQuity* v. *Doudna*, 101 Ia. 144 (70 N. W. Rep. 99). Applying Minn. Gen. Stat. 1894, § 1654, it is held that where certain land was assessed at the time of issuing the notice of the expiration of redemption in the name of "Anna S. Howard and C. Ingalls," a notice directed to "Anna S. Howard and Cordelia Ingalls," and personally served on them is sufficient, where C. and Cordelia Ingalls are one and the same person. The notice may include more than one tract where several tracts were assessed to the same person, sold to the same purchaser at the same tax sale, and were separately and distinctly described in the notice with date of sale, amount sold for, interest, and the amount required to redeem set opposite each tract, the notice being so worded that the owner might redeem one or more or all of the tracts. *Snyder* v. *Ingalls*,

70 Minn. 16 (72 N. W. Rep. 807). Particular notice of the expiration of time given for redemption, held sufficient. *McNamara* v. *Fink*, 71 Minn. 66 (73 N. W. Rep. 649). Wash. Code, 1881, § 2934, as amended by Act Feb. 8, 1886, construed and applied—notice of expiration of time given for redemption. *Herrick* v. *Niesz*, 16 Wash. 74 (47 Pac. Rep. 414).

Sec. 916. Tax deed. A tax deed executed in conformity with law will be presumed to be valid. *Stroebel* v. *Seeger*, 49 La. 86 (21 So. Rep. 126). One entitled to a tax deed may compel its execution by *mandamus* against the officer whose duty it is to execute it. *State* v. *Bradshaw*, 89 Fla. 187 (22 So. Rep. 296). Where, after a tax sale, such payments are made upon property sold as to deprive the officer of authority to issue a tax deed for the whole thereof, and he is unable to determine upon what part or portion of the land sold the taxes have been paid, he may refuse to execute a deed until this question is determined. *Kneeland* v. *Auditor General*, 113 Mich. 63 (71 N. W. Rep. 477). A tax deed may embrace several lots or tracts of land. *Crisman* v. *Johnson*, 23 Colo. 264 (47 Pac. Rep. 296; 58 Am. St. Rep. 224). A tax deed purporting to convey several tracts of land which are not contiguous, but widely separated and in different townships, sold together, *en masse*, for a gross sum, is void. *Emerson* v. *Shannon*, 23 Colo. 274 (47 Pac. Rep. 302; 58 Am. St. Rep. 232). Citing, *Hall's Heirs* v. *Dodge*, 18 Kan. 279; *Byan* v. *Cook*, 21 Ia. 392; *Farnham* v. *Jones*, 32 Minn. 7 (19 N. W. Rep. 38). A tax deed is insufficient as an operative coveyance where it purports to convey certain lands excepting a given number of acres, the location of which is not given. *Zundel* v. *Baldwin*, 114 Ala. 328 (21 So. Rep. 420). Under Ala. Code 1876, § 460, a tax deed not acknowledged prior to its registration is of no validity whatever. *Flowers* v. *Jernigan*, 116 Ala. 516 (22 So. Rep. 858). Construing and applying Cal. Pol. Code, § 3786, which requires that a tax deed shall recite the matters recited in the certificate of sale, and § 3776, which requires that the certificate of sale must state "the name of the person assessed, the description of the land sold, the amount paid therefor, that it was sold for taxes, giv-

ing the amount and year of the assessment and stating the time when the purchaser will be entitled to a deed," it is held that a tax deed which does not definitely state the year of the assessment and the amount paid for the lands, is void. *Simmons* v. *McCarthy*, 118 Cal. 622 (50 Pac. Rep. 761). The validity of a tax deed is not affected by the fact that its recitals show that the date of the expiration of the time for redemption upon which the purchaser was entitled to a deed came on Sunday. Cal. Pol. Code, § 8776, applied. *Rollins* v. *Woodman*, 117 Cal. 516 (49 Pac. Rep. 455). When authority exists for a sale made by a tax collector, his deed is not vitiated by a reference in it to a superseded legislative act instead of an existing act under which the sale is made. *Sims* v. *Walshe*, 49 La. 781 (21 So. Rep. 861). Where the sufficiency of a tax title claimed under a deed made in pursuance of a sale had upon a tax execution is dependent upon defendant's having title to the premises, one claiming under such title must show a perfect title in the execution defendant. *McLeod* v. *Brooks Lum. Co.*, 98 Ga. 258 (26 S. E. Rep. 745). Mich. Pub. Acts 1875, No. 154, § 98, construed and applied —withholding of conveyance by auditor general. *Hand* v. *Auditor General*, 112 Mich. 597 (71 N. W. Rep. 160).

Sec. 917. Tax deed—Conclusiveness as evidence of title—Statutes construed. Sayles' Tev. Civ. Stat., art. 447, making a tax deed *prima facie* evidence of certain facts, has no application to a suit on a tax deed for land not described by it. *Ozee* v. *City of Henrietta*, 90 Tex. 334 (38 S. W. Rep. 768). Where a statute (S. Dak. Comp. Laws, § 1639) makes a tax deed conclusive " evidence of all facts therein recited," such a deed is conclusive as to its recitals which render the instrument void. *Salmer* v. *Lathrop*, 10 S. Dak. 216 (72 N. W. Rep. 570). Statutes which make a tax deed *prima facie* evidence of the regularity of the sale, do not extend to antecedent omissions rendering the sale void. *Cucullu* v. *Brakenridge Lum. Co.*, 49 La. 1445 (22 So. Rep. 409). Citing, *Treville* v. *Smalls*, 98 U. S. 522. Miss. Laws 1860, p. 216, § 7, providing that thereafter no tax title could be impeached in that state in any manner or for any cause saving fraud or mistake in the assessment or sale of the wrong lands, is held

not to preclude one from showing that the sale upon which the title rests was made for taxes levied in aid of the rebellion and was therefore void. *Boyle* v. *Manion*, Miss. (22 So. Rep. 947). Where a statute (Mills' Ann. Colo. Stat., § 3902) makes a tax deed *prima facie* evidence of all the facts essential to a valid tax title, the fact that the numbers of the lots in a deed conveying several lots are not consecutive, does not sufficiently establish that they are non-contiguous so as to render the deed void. *Crisman* v. *Johnson*, 23 Colo. 264 (47 Pac. Rep. 296; 58 Am. St. Rep. 224). Citing, *Cartwright* v. *McFadden*, 24 Kan. 662. Under Idaho Rev. Stat., § 1555, a tax deed regular on its face, is *prima* evidence of the existence and regularity of all the facts and acts set forth in the eight subdivisions of said section; and to defeat such deed the adverse party must show the non-existence of such facts or some of them. *Cooperative Sav. & L. Ass'n* v. *Green*, Idaho (51 Pac. Rep. 770). The presumptions given a tax deed by Iowa Code, § 897, are not overcome by the fact that the county records do not show the existence of the presumed facts, where it appears that a large portion of such records had been destroyed by fire. *Barrett* v. *Kevane*, 100 Ia. 653 (69 N. W. Rep. 1036). A tax deed will not sustain an action of ejectment, where it appears that the auditor general, empowered to file proceedings for the sale of land for delinquent taxes, by Mich. Acts 1893, No. 206, § 61, has issued a certificate of error under § 98 of said act showing that the tax for which the land was sold had been paid before the sale. *Wood* v. *Bigelow*, 115 Mich. 123 (73 N. W. Rep. 129). Minn. Gen. Stat. 1894, §§ 1594, 1601, applied—conclusiveness of certificate of assignment of sale made to the state. *McNamara* v. *Fink*, 71 Minn. 66 (73 N. W. Rep. 649). A statute (Wash. Code 1881, § 2937), making a tax deed duly executed *prima facie* evidence of "the regularity of all other proceedings from the assessment by the assessor, inclusive, up to the execution of the deed," does not make such a deed evidence of a compliance by the holder thereof with the provisions of a subsequent statute, requiring the holder of a tax certificate to give notice of application for a deed, at least sixty days prior to the expiration of the time for redemption. The proceedings, the regularity of which the deed is made evidence, are the acts and proceedings required

to be done and had at the hands of the public officials intrusted with the various steps leading up to the execution of the deed and not something required to be done by the applicant for the deed. *Herrick* v. *Niesz*, 16 Wash. 74 (47 Pac. Rep. 414). Citing *Miller* v. *Miller*, 96 Cal. 876 (31 Pac. Rep. 247; 31 Am. St. Rep. 229); *Reed* v. *Thompson*, 56 Ia. 455 (9 N. W. Rep. 331).

Sec. 918. Judicial proceedings to collect taxes. In a collector's suit for taxes, a school district tax can be joined with the town, county and state taxes. *Mason* v. *Belfast Hotel Co.*, 89 Me. 381 (36 Atl. Rep. 622). In an action to foreclose a lien for taxes, neither the wife of the landowner nor other lien holders are necessary parties. *People* v. *Weber*, 164 Ill. 412 (45 N. E. Rep. 728). Under the statute of Maine a complaint in an action brought by a town to recover taxes must aver that the selectmen directed in writing the action to be brought. *Inhabitants of Wellington* v. *Small*, 89 Me. 154 (36 Atl. Rep. 107). Particular tax judgment held not subject to collateral attack. *Kizer* v. *Caufield*, 17 Wash. 417 (49 Pac. Rep. 1064). Particular tax judgment book held sufficient under the laws of Minnesota. *Sommerville* v. *Thrift*, 69 Minn. 474 (72 N. W. Rep. 706). Ala. Code, § 572, applied—notice of decree of sale under an assessment against an unknown owner. *Smith* v. *Cox*, 115 Ala. 503 (22 So. Rep. 78). Ill. Rev. Stat. 1889, ch. 120, § 258, regulating the foreclosure of a lien for taxes is applicable to liens for drainage assessments made under Drainage Act, May 29, 1879. *People* v. *Weber*, 164 Ill. 412 (45 N. E. Rep. 728). Baltimore City Code 1879, art. 49, § 4, construed and applied—notice of delinquency in the payment of taxes. *Textor* v. *Shipley*, 86 Md. 424 (38 Atl. Rep. 982). Mich. Pub. Acts 1889, No. 195, § 59, construed and applied—petition by auditor general for the sale of lands for delinquent taxes. *Muirhead* v. *Bergland*, 111 Mich. 655 (70 N. W. Rep. 148). Mich. Laws 1893, No. 206, construed and applied—decree in tax proceedings. *Mersereau* v. *Miller*, 112 Mich. 108 (70 N. W. Rep. 341). Errors, irregularities, or omissions in the assessment of land, do not go to the jurisdiction of a court to render judgment for taxes and are no ground for a collateral attack on the judgment. Minn.

Gen. Stat. 1894, § 1582, applied. *McNamara* v. *Fink*, 71 Minn. 66 (73 N. W. Rep. 649). Although under Mo. Rev. Stat. 1889, § 7569, an owner of land is personally liable for taxes assessed thereon, it is held that no personal judgment can be rendered against him for such taxes, as §§ 7608, 7681–7684, provide a remedy for their collection which will be construed as exclusive. *State* v. *Snyder*, 139 Mo. 549 (41 S. W. Rep. 216). For cases depending upon particular questions of evidence in an action to enforce a lien for taxes, see *City of Olympia* v. *Stevens*, 15 Wash. 601 (47 Pac. Rep. 11). As to the conclusiveness of a decree of condemnation in Arkansas, see *Streett* v. *Reynolds*, 68 Ark. 1 (38 S. W. Rep. 150).

Sec. 919. Statute of limitations and tax titles. One holding under a void tax deed cannot claim the benefit of the statute of limitations. *Crisman* v. *Johnson*, 23 Colo. 264 (47 Pac. Rep. 296; 58 Am. St. Rep. 224); *McKeown* v. *Collins*, 38 Fla. 276 (21 So. Rep. 103), applying Fla. Laws 1883, ch. 3413, § 61; *Salmer* v. *Lathrop*, 10 S. Dak. 216 (72 N. W. Rep. 570). In the last case the court say: "Says Mr. Black: 'The provision of a statute of limitations, to the effect that an action for the recovery of real property sold for taxes can only be commenced within a certain number of years from the date of the recording of the deed, will not run in favor of a tax deed that is void upon its face, even when the land intended to be conveyed by the tax deed has been in actual, open and notorious possession of the holder of the void deed during the whole of the statutory period.' To the same effect, see, also, *Heger* v. *DeGroat*, 3 N. Dak. 354 (56 N. W. Rep. 150); *Hall's Heirs* v. *Dodge*, 18 Kan. 277; *Daniels* v. *Case*, 45 Fed. Rep. 843; *Nichols* v. *McGlathery*, 43 Ia. 189; *Towle* v. *Holt*, 14 Neb. 221 (15 N. W. Rep. 203); *Hurd* v. *Bresner*, 3 Wash. 1 (28 Pac. Rep. 371; 28 Am. St. Rep. 17); *Pearce* v. *Tittsworth*, 87 Mo. 635; *Sheehy* v. *Hinds*, 27 Minn. 259 (6 N. W. Rep. 781); *Coulter* v. *Stafford*, 6 C. C. A. 18 (56 Fed. Rep. 564); *Redfield* v. *Parks*, 132 U. S. 239 (10 Sup. Ct. Rep. 88)."

In Alabama the three year statute of limitations does not commence to run against an action to recover land sold for

taxes until delivery and registration of the tax deed. *Smith* v. *Cox*, 115 Ala. 508 (22 So. Rep. 78). Cal. Pol. Code, § 3788, providing that " in all cases where land has been heretofore sold for delinquent taxes, the deed therefor must be made within one year and three months after this act takes effect, and unless so made the purchaser shall be deemed to have relinquished all his rights under such sale," does not apply to a purchase made by the state. *Z. Russ & Sons Co.* v. *Crichton*, 117 Cal. 695 (49 Pac. Rep. 1043). Applying Mills' Ann. Colo. Stat., § 3902, making a tax deed *prima facie* evidence that the property was advertised for sale as required by law, and § 3904, providing that " no action for the recovery of land sold for taxes shall lie unless the same be brought within five years after the execution and delivery of the deed therefor by the treasurer," it is held that an action assailing a tax title on the ground of the insufficiency of the notice of sale must be brought within five years. *Crisman* v. *Johnson*, 23 Colo. 264 (47 Pac. Rep. 296; 58 Am. St. Rep. 224). A statute of limitations (Fla. Laws 1887, ch. 3681, § 60), limiting an action by a former owner to four years, begins to run from the execution and delivery of the tax deed. *Spaulding* v. *Ellsworth*, 39 Fla. 76 (21 So. Rep. 812). Construing Ia. Code 1873, § 902, providing that "no action for the recovery of real property sold for the payment of taxes shall lie, unless the same be brought within five years after the treasurer's deed is executed and recorded," it is held that § 2532, providing that an action shall be deemed commenced upon delivery of the original notice to the sheriff of the proper county with intent that it be served immediately, applies to actions of this character. *Smith* v. *Callanan*, 103 Ia. 218 (72 N. W. Rep. 513). Under Kan. Code Civ. Proc., § 16, a party who seeks to recover lands sold for taxes claiming under a tax deed duly recorded, must bring his action in two years after his cause of action accrues. *Coale* v. *Campbell*, 58 Kan. 480 (49 Pac. Rep. 604). Where a statute (Minn. Gen. Stat. 1894, § 1610), which provides that where a tax sale is judicially declared void, the purchaser may have refunded to him the purchase price and all the subsequent taxes, penalties and costs paid by him, with interest, specifies that " such proceedings shall not operate as a payment or cancellation of any tax included in

the judgment or refundment, but the same shall stand as originally extended against the property, and * * * be included in the taxes thereon for the current year in the next delinquent tax sale," it is held that the object of the statute being to give the state the right to institute new proceedings to enforce the payment of taxes after it has been judicially determined that prior proceedings for that purpose were ineffectual, the right to institute such new proceedings cannot be barred by the lapse of time between the institution of the original proceedings and the judicial determination of their invalidity. *Chisago Co.* v. *Kipp*, 70 Minn. 286 (73 N. W. Rep. 164). In Nebraska it is held that an action for the foreclosure of a tax lien cannot be maintained after the lapse of more than nine years from the date of the tax sale, by virtue of which such lien is claimed to have originated. *Hathaway* v. *Nelson*, 52 Neb. 109 (71 N. W. Rep. 981). Construing and applying Wash. Laws 1877, p. 169; Laws 1879, p. 48, it is held that a tax deed cannot be set aside unless action is brought within ten years. *Ward* v. *Huggins*, 16 Wash. 580 (48 Pac. Rep. 240). S. & B. Ann. Wis. Stat., § 1210h, prescribing the period of limitation upon actions to set aside a tax sale or cancel a tax certificate, applies to tax sales and certificates issued thereon for street improvements. *Levy* v. *Wilcox*, 96 Wis. 127 (70 N. W. Rep. 1109).

Sec. 920. **Miscellaneous notes.** Where a landowner's failure to pay taxes resulted from the treasurer's misinforming him as to the amount due, which was occasioned by the former's inaccurate description of the property, he must suffer the consequences. *Browne* v. *Finlay*, 51 Neb. 465 (71 N. W. Rep. 84). Where two lots belonging to one person are assessed together, in an action by a subsequent purchaser of one of them, against the county to quiet title, the court should apportion the taxes so as to require him to pay only the amount justly due on his lot. *Rochford* v. *Fleming*, 10 S. Dak. 25 (71 N. W. Rep. 817). Defects in tax proceedings anterior to the execution of a tax deed good upon its face, which has been of record five years, cannot, in an action to quiet title brought by the tax-deed claimant, be shown by the defendant thereto for the purpose of basing thereon a claim of recovery, as in eject-

ment, for rents and profits. *Goddard* v. *Storch*, 57 Kan. 714 (48 Pac. Rep. 15). One whose property is within the limits of a city cannot restrain the collection of a city tax regularly assessed, because his property is outside the range of municipal benefits. *Frace* v. *City of Tacoma*, 16 Wash. 69 (47 Pac. Rep. 219).

Sec. 921. Construction of miscellaneous statutes. Proceedings for depriving an owner of his land by sale for nonpayment of taxes being statutory, every requsite of the statute having the semblance of benefit to the owner must be substantially, if not strictly complied with. *Clason* v. *Baldwin*, 152 N. Y. 204 (46 N. E. Rep. 322). Conn. Gen. Stat., § 3844, construed and applied—collection of taxes assessed against an estate of a decedent. *White* v. *Town of Portland*, 68 Conn. 293 (36 Atl. Rep. 46). Fla. Acts 1885, ch. 3628, 3786, applied—sale of land by tax collector of the city of Orlando. *State* v. *Bradshaw*, 39 Fla. 137 (22 So. Rep. 296. Where, for the purpose of obtaining an extension of time on a prior mortgage, one who holds a mortgage, the lien of which is superior to a lien for taxes assessed against the landowner on his personal property, redeems from a tax sale made for such taxes, he cannot recover from the county the amount paid by him in making such redemption, under Iowa Code, § 870, directing the treasurer to refund any taxes found to have been erroneously or illegally exacted. *Bibbins* v. *Polk Co.*, 100 Ia. 493 (69 N. W. Rep. 1007). Iowa Revision, 1860, §§ 711, 712, construed and applied—taxation of government lands—when they become taxable. *Barrett* v. *Kevane*, 100 Ia. 653 (69 N. W. Rep. 1036). Kan. Comp. Laws 1862, ch. 198, §§ 4, 6, 13, construed and applied—taxation of lands entered in 1863 with military bounty land warrants. *Goddard* v. *Storch*, 57 Kan. 714 (48 Pac. Rep. 15). La. Laws 1884, Act No. 82, applied—adjudication by tax collector. *Fishel* v. *Stark*, 49 La. 855 (21 So. Rep. 595); *Fitzpatrick* v. *Leake*, 49 La. 794 (21 So. Rep. 597). La. Laws 1884, Act No. 82, construed and applied—validity of tax sale. *Clifford* v. *Michener*, 49 La. 1511 (22 So. Rep. 811). Md. Code, Art. 81, §§ 47, 64; Laws 1892, ch. 518, construed and applied—liability of trustees for creditors of

lessee for taxes assessed against the leasehold estate. *Parlett* v. *Dugan*, 85 Md. 407 (37 Atl. Rep. 86). Mich. Pub. Acts 1893, No. 206, construed and applied—sale of lands for delinquent taxes. *Muirhead* v. *Sands*, 111 Mich. 487 (69 N. W. Rep. 826). A statute (3 How. Ann. Mich. Stat., § 799), which makes an assessment by fence viewers of the cost of repairing a division fence, a lien on the land and provides for its collection as a tax is not unconstitutional. *Gilson* v. *Supervisor*, 114 Mich. 671 (72 N. W. Rep. 994). Mich. Acts 1893, No. 206, § 70, construed and applied—report of county treasurer of tax sales. *Jenison* v. *Conklin*, 114 Mich. 9 (71 N. W. Rep. 1114). A certificate of sale required to be issued by the county auditor to a purchaser at a sale of lands forfeited to the state, under the provisions of Minn. Gen. Laws 1881, ch. 135, is not valid unless executed at the time of the sale or within a reasonable time thereafter. *Smith* v. *Lambert*, 68 Minn. 313 (71 N. W. Rep. 381). N. J. Gen. Stat., Vol. 3, p. 3370 ("Martin Act"), construed. *Burgin* v. *Rutherford*, 56 N. J. Eq. 666 (38 Atl. Rep. 854). N. Y. Laws 1892, ch. 399, § 2, construed and applied—exemption of property from the transfer tax. *In re Beach's Estate*, 154 N. Y. 242 (48 N. E. Rep. 516). N. Y. Laws 1896, ch. 908, § 230, construed and applied—appraisement of life estate and remainder under the transfer tax law. *In re Sloane's Estate*, 154 N. Y. 109 (47 N. E. Rep. 978). Pa. Act April 10, 1849, § 12 (Pub. Laws, p. 571), construed and applied—appraisement of property for assessment of collateral inheritance tax. *In re Moneypenny's Estate*, 181 Pa. St. 309 (37 Atl. Rep. 589). Pa. Pub. Laws 1887, p. 79, § 3, construed and applied—enforcement of collateral inheritance tax against estate in remainder. *In re Coxe's Estate*, 181 Pa. St. 369 (37 Atl. Rep. 517). S. C. Rev. Stat., § 334, construed and applied—rights of mortgagee as to the payment of taxes. *Interstate Bldg. & Loan Ass'n* v. *Waters*, 50 S. C. 459 (27 S. E. Rep. 948). S. Dak. Laws 1891, ch. 14, §§ 82, 83, construed and applied—possession of a tax receipt as evidence of payment. *Rochford* v. *Fleming*, 10 S. Dak. 25 (71 N. W. Rep. 317). Va. Laws 1895–96, p. 219; Code, §§ 661, 3232, construed and applied—sale of lands bid in by state—application for purchase—service of notice of application by publication—title

of purchaser. *Thomas* v. *Jones*, 94 Va. 756 (27 S.E. Rep. 813). For particular cases as to the forfeiture of land for taxes in Virginia, see, *Harman* v. *Stearns*, 95 Va. 58 (27 S. E. Rep. 601). The right of a former owner or his heirs and assigns to receive the excess of the sum for which the land may be sold, over the taxes charged and chargeable thereon, under W. Va. Const., art. 13, § 5; Code Ch. 105, § 16, may be exercised at any time within two years from the time the sale is fully consummated. *Thompson* v. *Cox*, 42 W. Va. 566 (26 S. E. Rep. 189). W. Va. Code 1868, ch. 31, § 34; Const. 1872, art. 13, § 6; Laws 1872-73, p. 331, ch. 117, construed and applied—forfeiture of lands for nonentry for taxation. *Parkersburg Industrial Co.* v. *Schultz*, 43 W. Va. 470 (27 S. E. Rep. 255).

Sec. 922. Statutes amended and new statutes. Ala. Code (1896), § 4057—sales under decree for sale of real estate to pay taxes—notice of sale—amended, Laws 1898-99, p. 53. Ala. Code (1896) § 4097—redemption of lands bid in by the state—amended, Laws 1898-99, p. 166. Ala. Laws 1898-99, p. 120, provides for the correction of erroneous sales of property for taxes, for the protection of real estate bid in by the state and for the sale of such real estate. Ariz. Laws 1899, p. 44—rights of purchaser at void sale. Cal. Laws 1899, p. 101, establishes a collateral inheritance tax. Fla. Laws 1895, ch. 4322, § 57—redemption from tax sale—amended, Laws 1899, p. 6, ch. 4664. Fla. Laws 1895, ch. 4322, §§ 60, 61—form of tax deed and issuance by clerk of circuit court — amended, Laws 1899, p. 8, ch. 4662. Fla. Laws 1899, p. 26—redemption of tax certificates held by the state of Florida. Fla. Laws 1899, p. 27—sale of tax certificates held by the state—execution of deed. Ida. Rev. Stat., § 1401—exemption of property from taxation—amended, Laws 1899, p. 220. Ida. Pol. Code, § 1548 — redemption from tax sale — amended, Laws 1899, p. 267. Ida. Rev. Stat., § 1553—execution of tax deed to purchaser—amended, Laws 1899, p. 376. La. Laws 1899, p. 127, provides a form of proceeding to quiet tax titles. Me. Rev. Stat., ch. 6, § 196—duty of collector as to execution of certificate of sale and deed—amended, Laws 1899, p. 87. Me. Laws 1899, p. 108, ch. 97, provides that the cost of Internal

Revenue stamps affixed to a tax deed shall be deemed a part of the costs and charges for making the sale. The following statutes of Michigan concerning the assessment of property and the levy and collection of taxes thereon have been amended: Comp. Laws 1897, § 3889, by Laws 1899, pp. 44, 434; Comp. Laws 1897, §§ 3949, 3950, 3952, 3953, 3955, by Laws 1899, p. 150; Laws 1893, No. 206, by Laws 1899, p. 248, which adds two sections (§§ 188, 189) to the former act; Comp. Laws 1897, § 3870, by Laws 1899, p. 334; Laws 1893, Act No. 206, § 18, by Laws 1899, p. 375; Comp. Laws 1897, §§ 3847, 3864, 3882, 3884, 3885, 3890, 3893, 3896, 3897, 3901, 3907, 3912, 3921, 3925, by Laws 1899, p. 421. Minn. Gen. Stat. 1878, ch. 11, § 5—exemption of property from taxation—amended, Laws 1899, p. 235. Minn. Gen. Stat. 1894, § 1605—refundment of excess payment of taxes—amended, Laws 1899, p. 224. Minn. Gen. Stat. 1894, § 1617—sale of forfeited property on tax sale—execution of deed to purchaser—amended, Laws 1899, p. 33. Minn. Laws 1897, ch. 290, § 5—tax sale—when and how made and redemption from—amended, Laws 1899, p. 86. Minn. Laws 1897, ch. 293, § 16—inheritance tax—amended, Laws 1899, p. 305. Minn. Laws 1899, p. 198, makes the lien of taxes assessed against an improved town lot a joint lien upon the land and buildings, and provides for the enforcement of the lien against the buildings in case of their removal. Minn. Laws 1899, p. 95—rights of purchaser in case of void sale. Minn. Laws 1899, p. 268—assessment of timber and mineral lands. Minn. Laws 1899, p. 410, provides for the enforced collection of taxes which became delinquent prior to 1897. Mo. Rev. Stat. 1889, § 1372—form of tax deed executed by city collector—amended, Laws 1899, p. 80. Mo. Rev. Stat., § 4894b—tax deed—of what it is *prima facie* evidence—amended, Laws 1899, p. 207. Missouri has enacted a law to tax collateral inheritances. Laws 1899, p. 328. N. J. Laws, 1894, Act May 15th—collateral inheritance tax—supplemented by an additional provision, Laws 1898, p. 106. N. J. Gen. Stat., pp. 3358, 3359, §§ 330, 368—priority of lien for taxes—amended, Laws 1898, p. 455. N. J. Gen. Stat., p. 3354, § 338—redemption of property from tax sale—amended, Laws 1898, p. 457. N. J. Laws 1898, p. 202, subjects to taxation real estate held in an official capacity. New Mexico has

a new statute concerning the assessment and collection of taxes. Laws 1899, pp. 47–61, amending Comp. Laws 1897, §§ 1757, 2685, 3956, 4015, 4032, 4045, 4048, 4057, 4062, 4066, 4067 and 4071. N. Mexico Laws 1899, p. 66, grants to purchasers at tax sales heretofore made, the lien of the county and territory for the taxes for which the sale was made. North Carolina has a new statute regulating the sale of real estate for taxes. Laws 1899, ch. 15, §§ 51–102, pp. 84–101. N. Dak. Laws 1897, ch. 126, § 82 — redemption of land from tax sale within three years—amended, Laws 1899, p. 206. N. Dak. Laws 1899, p. 225, provides a form for a tax deed and when and by whom it must be executed. Under S. C. Laws 1899, p. 80, a lien for taxes expires in ten years. S. Dak. Laws 1899, ch. 48, p. 54, authorizes the purchase of tax sale certificates by municipal corporations. Tex. Laws 1899, p. 50, provides for the redemption within two years from the sale, of land sold under decree of court for taxes due an incorporated city or town. Tex. Laws 1899, ch. 65, p. 68, extends the time allowed for, and provides the manner of, redemption from tax sales made under decree of court under Laws 1895, ch. 42; Laws 1897, ch. 108. Va. Code, § 664 — redemption of delinquent lands—amended, Laws 1897–98, p. 518. Va. Laws 1896, act Feb. 14th—collateral inheritance tax—amended, Laws 1897–98, p. 569. Wash. Laws 1897, act Mar. 15th, relating to revenue and taxation — amended, Laws 1899, p. 285. Wis. Rev. Stat. 1898, § 1059—assessment of property omitted from assessment—amended, Laws 1899, p. 65. Wis. Rev. Stat. 1898, § 1189a—limitation of actions to recover land sold for taxes or to quiet title thereto — amended, Laws 1899, ch. 351, § 21. Wis. Stat. 1898, §§ 840, 1081, 1083, 1089, 1090, relating to collection of taxes — amended, Laws 1899, p. 608, repealing §§ 1108, 1109. Wis. Laws 1899, p. 131, provides for the redemption of land sold for taxes in cities within three years from the date of the certificate of sale. Wyo. Laws 1899, p. 129—purchase by county at tax sale—resale and redemption.

TENANTS IN COMMON.

EPITOME OF CASES.

Sec. 923. Creation of an estate in common. Common seisin in fact or law without regard to source of title creates a cotenancy; and one who obtains the possession of a cotenant, will be held to hold under the cotenancy possession and not under an independent adverse claim of title. *Davis* v. *Settle*, 43 W. Va. 17 (26 S. E. Rep. 557). The fact that a conveyance by one of four devisees contains immediately after the specific description of the lands conveyed the words "or the one-foutth part of all the land that my father, M., died seized and possessed of," does not make the grantee a tenant in common in other land held by the deceased. *Midgett* v. *Twiford*, 120 N. C. 4 (26 S. E. Rep. 626). Where partners take title to land as tenants in common, the presumption arising from the deed is that they hold the title as tenants in common in equal shares, and the estate created by such deed controls in fixing the rights of their creditors and purchasers from them. *Stover* v. *Stover*, 180 Pa. St. 425 (36 Atl. Rep. 921; 57 Am. St. Rep. 654). Particular trust deed in which the beneficiaries are held to be tenants in common of the trust estate. *Wilson* v. *Wilson*, 119 N. C. 588 (26 S. E. Rep. 155).

Sec. 924. Trust relations—Buying in titles, etc. In a particular case in which brothers and sisters holding as tenants in common of lands having only a speculative value, the sale of which they were all trying to negotiate, it is held that a part of them receiving a bonus for consenting to a sale would be held to account to their cotenants for their *pro rata* share of such bonus. *Garr* v. *Boswell*, Ky. (38 S.W. Rep. 513). A tenant in common cannot acquire title adverse to a cotenant by purchase at a tax sale or by the purchase of an outstanding incumbrance which is permitted to ripen into

a title. *Van Ormir* v. *Harley*, 102 Ia. 150 (71 N. W. Rep. 241). Where land is held by one person under a secret trust for himself and another, a purchase of the land by the latter at a foreclosure sale inures to the benefit of both parties. *Hodgson* v. *Fowler*, 24 Colo. 278 (50 Pac. Rep. 1034). A cotenant in possession of the property which is mortgaged to secure his debt, cannot obtain title thereto by procuring a third person to bid in the property at a foreclosure sale, the making of which is concealed from the other cotenants, and buying the land from such purchaser. *Saladin* v. *Kraayvanger*, 96 Wis. 180 (70 N. W. Rep. 1113). Where the interests of cotenants in land are separately assessed, and the taxes levied upon each undivided interest, one cotenant may buy in for his own benefit at a tax sale the undivided interest of another cotenant. *Bennet* v. *North Colo. Springs L. & Imp. Co.*, 23 Colo. 470 (48 Pac. Rep. 812). Citing, *Brittin* v. *Handy*, 20 Ark. 381 (73 Am. Dec. 497); *Roberts* v. *Thorn*, 25 Tex. 728 (78 Am. Dec. 552). One tenant in common cannot claim reimbursement for taxes paid by him which were assessed against him alone, when he and the officer making the assessment both believed the entire estate to belong to such cotenant. *O'Hara* v. *Quin*, 20 R. I. 176 (38 Atl. Rep. 7).

Sec. 925. Ouster—Liability for rent. Ejectment cannot be maintained by one cotenant against another where the former has not been actually ousted and there is no exclusive possession of the latter after demand and no express notice by him of a claim of adverse possession. *Daniel* v. *Daniel*, 102 Ga. 181 (28 S. E. Rep. 167). Where in an action of ejectment by a tenant in common against his cotenant the latter asserts by his answer, title by adverse possession for the prescriptive period, and the court finds an adverse holding for less than the prescriptive period, an ouster by the defendant is established. *Grant* v. *Paddock*, 30 Or. 312 (47 Pac. Rep. 712). Where one cotenant occupies the common property, but his occupation is not adverse and he does not exclude therefrom his cotenant, he is not liable for rent, although his cotenant does not share in the use of the premises; but when there is an ouster and a tenant in common occupies

and uses the property adversely to his cotenant, or where he leases it to a third person, he is liable to his cotenant for rent. A cotenant in possession, who procures a sale of the land for taxes, does not thereby oust his cotenant until the tax deed is made. *Van Ormer* v. *Harley*, 102 Ia. 150 (71 N. W. Rep. 241). Possession of the premises by one cotenant with the aquiescence of the others, does not render him liable to pay rent or give a right to charge for inconsequential improvements. *Hixon* v. *Bridges*, Ky. (38 S. W. Rep. 1046). The English rule that one in possession by consent of his cotenant, cannot be required to account to his cotenant for a share of the profits arising from his use of the premises, cannot be carried so far as to permit the cotenant in possession to have the exclusive use of the premises after entry or demand of possession until the crop growing at the time of the entry or demand shall mature. *Moreland* v. *Strong*, 115 Mich. 211 (73 N. W. Rep. 140). As a general rule the friendly occupation of the common estate by one tenant, does not render him liable to account for the rents and profits; but where one tenant in common actually receives rents for the common property from those to whom he rents it, he may be compelled to account for such profits actually received. *McCaw* v. *Barker*, 115 Ala. 543 (22 So. Rep. 131); *Wipff* v. *Heder*, Tex. Civ. App. (41 S. W. Rep. 164). Where a tenant in common who has furnished funds to reimburse one who has advanced money to discharge a mortgage on the estate has reimbursed himself from the rents without objection from the other cotenants, he will not be compelled to refund the amount so obtained, on partition. *Ostermeyer* v. *Ostermeyer*, Ky. (39 S. W. Rep. 22). Mont. Code Civ. Proc., § 592—occupancy and use of property by joint tenants and tenants in common—actions between—amended, Laws 1899, p. 134.

Sec. 926. Injury to property by cotenant—Remedies. A tenant in common may be enjoined from making alterations in a building which interfere with the rightful occupancy by his cotenant of a portion of the building. *Woods* v. *Early*, 95 Va. 307 (28 S. E. Rep. 374). Applying W. Va. Code 1891, ch. 92, § 2, making one tenant in common liable to another for waste, it is held that a tenant in common

who takes petroleum oil from the land thereby commits waste and is liable to his cotenants to the extent of their right in the land. *Williamson* v. *Jones*, 43 W. Va. 652 (27 S. E. Rep. 411; 64 Am. St. Rep. 891; 38 L. R. A. 694).

Sec. 927. Miscellaneous notes. A tenant in common of land in posession of the whole, cannot make a valid lease of the whole. *Moreland* v. *Strong*, 115 Mich. 211 (73 N. W. Rep. 140). Where pending an action by several cotenants for damages to their land one of them dies, the suit survives as to the other parties and may be proceeded in by them. In such a case the suit abates as to the deceased party. *Rowe* v. *Shenandoah Pulp Co.*, 42 W. Va. 551 (26 S. E. Rep. 320; 57 Am. St. Rep. 870). Where two tenants in common convey real estate to a purchaser and one of them entrusted with the delivery of the deed takes a bond and mortgage for the purchase money in his own name without the consent of the other, such act operates to terminate the relation of the parties as tenants in common and the party taking the bond and mortgage may be subjected to a suit for conversion of his cotenant's interest by the latter although the bond and mortgage is not yet due. *Knope* v. *Nunn*, 151 N. Y. 506 (45 N. E. Rep. 940; 56 Am. St. Rep. 642). Particular agreement between tenants in common as to the sale of the common estate and division of the proceeds, construed. *Goldsborough* v. *Goldsborough*, 86 Md. 413 (38 Atl. Rep. 934).

TITLE.

EPITOME OF CASES.

Sec. 928. Good and marketable title—Title acquired by adverse possession. A title acquired by prescription is a marketable title, *Rother* v. *Trusteee of Sharp St. Station M. E. Church*, 85 Md. 528 (37 Atl. Rep. 24); *Meibaum* v. *Brennan*, 49 La. 580 (21 So. Rep. 853); and is sufficient to satisfy a contract to convey land "in fee and unincumbered." *Barnard* v. *Brown*, 112 Mich. 452 (70 N. W. Rep. 1038). Cit-

ing, *O' Connor* v. *Huggins*, 113 N. Y. 521 (21 N. E. Rep. 184); *Foreman* v. *Wolf*, Md. (29 Atl. Rep. 837); *Tewksbury* v. *Howard*, 188 Ind. 103 (37 N. E. Rep. 855); *Elder* v. *McClaskey*, 17 C. C. A. 251 (70 Fed. Rep. 529); *Bicknell* v. *Comstock*, 113 U. S. 149 (5 Sup. Ct. Rep. 399); *Leffingwell* v. *Warren*, 2 Black 599; *Murray* v. *Harway*, 56 N. Y. 337; *Shriver* v. *Shriver*, 86 N. Y. 575; *Ballou* v. *Sherwood*, 32 Neb. 666 (49 N. W. Rep. 790; 50 N. W. Rep. 1131); *Schall* v. *Railway Co.*, 36 Pa. St. 191; *Moore* v. *Luce*, 29 Pa. St. 260 (72 Am. Dec. 269); *Hodges* v. *Eddy*, 41 Vt. 485 (98 Am. Dec. 612); *Crowell* v. *Druley*, 19 Ill. App. 509; *Ottinger* v. *Strasburger*, 33 Hun 466; *Simson* v. *Eckstein*, 22 Cal. 580; *Clancey* v. *Houdlett*, 39 Me. 451; *Walker* v. *Ray*, 11 Ill. 315; *De Long* v. *Mulcher*, 47 Ia. 445; *Thacher* v. *Booth*, Ky. (6 S. W. Rep. 460); *Lurman* v. *Hubner*, 75 Md. 268 (23 Atl. Rep. 646); *Ford* v. *Schlosser* (Com. Pl.), 34 N. Y. Supp. 12; 1 Am. & Eng. Enc. Law (2d Ed.) 889, and cases cited; *Dupont* v. *Starring*, 42 Mich. 492 (4 N. W. Rep. 190); *Bunce* v. *Bidwell*, 43 Mich. 542 (5 N. W. Rep. 1023).

Sec. 929. Good and marketable title—Title acquired in violation of a trust relation. The title to lands of a deceased owner claimed through a foreclosure sale, which is subject to a possible attack by his minor heirs on account of a purchase at the sale having been made in violation of a trust relation, is not a good and perfect title within the meaning of a contract by a vendor to convey such a title. *Ford* v. *Wright*, 114 Mich. 122 (72 N. W. Rep. 197). A contract to make a vendee "a good and sufficient title in fee simple" is not complied with by tendering a title which may be assailed by the heirs of a deceased owner, on account of the lands being purchased at his administrator's sale by a firm of which the administrator was a member. *Griffith* v. *Maxfield*, 63 Ark. 548 (39 S. W. Rep. 852). The court say: "In *Vought* v. *Williams*, 120 N. Y. 253 (24 N. E. Rep. 195; 17 Am. St. Rep. 634; 8 L. R. A. 591), the court said: 'It is an established principle of law that every purchaser of real estate is entitled to a marketable title free from incumbrance and defects, unless he expressly stipulates to accept a defective

title. * * * A marketable title is one that is free from reasonable doubt. There is reasonable doubt when there is uncertainty as to some defects appearing in the course of its deduction, and the doubt be such as affects the value of the land, or will interfere with its sale. A purchaser is not to be compelled to take property the possession of which he may be compelled to defend by litigation. He should have a title that will enable him to hold his land in peace, and, if he wishes to sell it, be reasonably sure that no flaw or doubt will arise to disturb its market value.' *Dobbs* v. *Norcross*, 24 N. J. Eq. 327; *Swayne* v. *Lyon*, 67 Pa. St. 436: *Yeates*, v. *Prior*, 11 Ark. 76; *Gill* v. *Wells*, 59 Md. 492; *Close* v. *Stuyvesant*, 132 Ill. 607 (24 N. E. Rep. 868; 8 L. R. A. 161); *Butts* v. *Andrews*, 136 Mass. 221; Wat. Spec., Perf. Cont., § 412."

Sec. 930. Good and marketable title—Vendee's rights—Particular cases. A marketable title is one that is free from reasonable objection to a reasonable purchaser. If there is an adverse claim to a tract of land, or a considerable part thereof, evidenced by the record title papers, with possession thereunder in dispute or doubtful, such adverse claim is sufficient to throw a cloud on the title, and render the same unmarketable until such title papers are cancelled. *Morrison* v. *Waggy*, 43 W. Va. 405 (27 S. E. Rep. 314). A purchaser is not bound to take a defective title from his vendor; nor is the vendor bound to have a perfect title at the date of the contract to sell. It is sufficient if the title is perfect at the time it is attempted to be enforced either by the vendor or purchaser. *McNeill* v. *Fuller*, 121 N.C. 209 (28 S. E. Rep. 299). A contract to convey land by good and sufficient deed, does not bind the party merely to execute a deed good in point of form, but it obligates him to make a title to the land free from reasonable doubt and to remove any existing incumbrance or protect the vendee against it. The vendee is entitled to a conveyance so drafted and executed as to leave no reasonable doubt as to its legal sufficiency to convey the land and free from such interlineations and erasures as are reasonably calculated to throw suspicion or cast doubt upon the paper as a valid *bona fide* conveyance. *Shouse* v. *Doane*, 39 Fla. 95 (21 So. Rep. 807).

A title which is not necessarily bad but which requires a judical action to perfect it, and the remedying of the defect in it is dependent upon parol evidence, is not such a marketable title as a vendee can be compelled to accept. *Heller* v. *Cohen*, 154 N. Y. 299 (48 N. E. Rep. 527). Where a contract for the sale of land excepting "all lots or parts of lots, streets or parts of streets, that may have been heretofore sold and conconveyed, or contracted to be sold," requires the vendor to make a good title, and the vendee will not be required to complete his purchase where litigation with the grantees of lots falling within the exception is necessary to determine their rights. *Koshland* v. *Spring*, 116 Cal. 689 (48 Pac. Rep. 58). The title of a vendor to lands upon which he has previously executed a deed of trust to his wife and daughter for life, and then to their heirs, with the power of sale in the wife and daughter, which trust has been renounced by a release executed by the trustee and the vendor's wife and daughter, being subject to a doubtful claim in favor of their heirs, is not such good and sufficient title as a vendee can be compelled to accept. *Loring* v. *Whitney*, 167 Mass. 550 (46 N. E. Rep. 57). Where one contracting with a purchaser of unpatented land from the owner thereof who was entitled to a patent, agreed to accept a warranty deed and abstract when tendered, if the abstract show a perfect title, except as to the issuing of the patent, it is held that he cannot object to the completion of his contract on account of the nonissuance of the patent, where such a deed and abstract are tendered. *Younie* v. *Walrod*, 104 Ia. 475 (73 N. W. Rep. 1021). Title to land is not rendered unmarketable by the existence of a highway across it which has never been legally closed, but which on account of notorious abandonment and the intervention of private rights the public is estopped to reassert further use of it; nor by the existence of a mortgage, the foreclosure of which is barred by the statute of limitations. *Baldwin* v. *Trimble*, 85 Md. 396 (37 Atl. Rep. 176; 36 L. R. A. 489). Particular title held to be a good title. *Genella* v. *McMurray*, 49 La. 988 (22 So. Rep. 198).

Sec. 931. Proof of title. Titles to real estate pass by deed, and when such deed has not been recorded, and cannot

be produced, and no copy of it is in evidence, the testimony of witnesses as to the existence of such deed, and of its contents, must be so clear and convincing as almost to preclude the possibility of a mistake. *Day* v. *Philbrook*, 89 Me. 462 (36 Atl. Rep. 991). In an action by one in possession of land, to restrain a city from appropriating it as a street, the burden is on the city to show title to such land. *Oglesby* v. *City of Santa Barbara*, 119 Cal. 114 (51 Pac. Rep. 181).

Sec. 932. Slander of title. In the case of *Cardon* v. *McConnell* 120 N. C. 461 (27 S. E. Rep. ,109), the supreme court of North Carolina say: "Slander of title of property may be committed and published orally or by writing, printing or otherwise, and the gist of the action is the special damage sustained; and, unless the plaintiff shows the falsity of the words published, the malicious intent with which they were uttered, and a pecuniary loss or injury to himself, he cannot maintain the action. If the alleged infirmity of the title exists, the action will not lie, however malicious the intent to injure may have been, because no one can be punished in damages for speaking the truth. It is essential in the action that the words be maliciously uttered and with intent to injure; and the burden of proving such malice, express or implied, rests upon the plaintiff. If he can show that the utterances were not made in good faith to assert a real claim of title, or facts and circumstances that warrant such an inference, then malice may be fairly implied. If the defendant should assert title to the property in question, or to some interest therein, which turned out to be unfounded, malice will not be presumed from such a fact, because malice must be shown as a subtantive fact. It is the duty of one believing that he has such a claim or interest to proclaim and assert it when a sale is in contemplation by another, in order that innocent persons may not be deceived or misled to their injury. If one be inquired of, he must speak the truth as he understands it and believes it to be. If he is present at a public sale of property claimed by himself, he must speak for the protection of purchasers, or he will be forever estopped. If at last, upon investigation, the defendant fails to show any title or interest in possession or in remainder, still, if his acts

were done in good faith at the time he spoke, no action will lie. The plaintiff claiming damages must show malice; that there was no probable cause for the defendant's belief; that he could not honestly have entertained such belief. The prevention of a sale by the assertion of a claim by A., although unfounded, is not actionable unless it be knowingly bottomed on fraud. 4 Coke 18; 4 Burrows 2422."

TREES.

EPITOME OF CASES.

Sec. 933. Growing trees as real estate—Contracts and conveyances concerning. Growing trees are considered a part of the real estate and a parol sale thereof is void under the statute of frauds. *Walton* v. *Lowrey*, 74 Miss. 484 (21 So. Rep. 243). A fruit tree, bush, or vine kept standing or growing for its fruit or shade, or ornamental tree or bush, is a part of the realty. *Missouri K. & T. Ry. Co.* v. *Lycan*, 57 Kan. 685 (47 Pac. Rep. 526). An oral sale of growing trees is but a license to remove them, which is revoked by the death of the licensor before the license is executed. *Spacy* v. *Evans*, Ind. (48 N. E. Rep. 855). In Maryland it is held that a parol sale of growing trees to be presently cut and removed by the vendee, is not a sale of an interest in land and for that reason within the statute of frauds. *Leonard* v. *Medford*, 85 Md. 666 (37 Atl. Rep. 365; 37 L. R. A. 449). When a grantor in a deed conveys hemlock bark and trees upon a certain tract of land, "with the right to enter upon said lot of land at any and all times during the term of ten years, to cut any trees, and make necessary roads to remove said bark and trees, during said term, without being liable for trespass," there is not an absolute sale of all the bark and trees upon the land, but only so much as the vendee may cut and remove within the term mentioned. *Webber* v. *Proctor*, 89 Me. 404 (36 Atl. Rep. 631). For construction of particular contract for the sale of standing timber, to be severed and carried away from the land,

which reserved title until the purchase price was paid, see *Clark* v. *B. B. Richards Lum. Co.*, 68 Minn. 282 (71 N. W. Rep. 389).

Sec. 934. Action for injuring or removing trees—Measure of damages. Trover, or trespass *de bonis asportatis*, can be maintained by the disseisee, the true owner, after his reentry, for the value of trees cut by the first or second disseisor or their grantees intermediate the disseisin and such reentry. *Alliance Trust Co.* v. *Nettleton Hardware Co.*, 74 Miss. 584 (21 So. Rep. 896; 60 Am. St. Rep. 531; 36 L. R. A. 155). Citing, *Morgan* v. *Varick*, 8 Wend. 587; *Truber* v. *Miller*, 48 Conn. 347; *Green* v. *Biddle*, 8 Wheat. 75; *Heath* v. *Ross*, 12 Johns. 140 (85 Am. Dec. 325, note). Ala. Code 1886, § 3296, construed and applied—who may maintain an action for wrongful cutting of trees—administrator or heirs—particular questions of evidence decided. *Louisville & N. R. Co.* v. *Hill*, 115 Ala. 334 (22 So. Rep. 163). A partner is not liable for the penalty imposed by Ala. Code 1886, § 3296, against one for "wilfully and knowingly" cutting trees on land not his own, when the act was done without his consent or knowledge by his copartner. *Williams* v. *Hendricks*, 115 Ala. 277 (22 So. Rep. 439; 41 L. R. A. 650). Where timber is unlawfully cut and removed in good faith, the measure of damages is the value of the logs when removed, less the cost of removing them. *Bond* v. *Griffin*, 74 Miss. 599 (22 So. Rep. 187).

TRESPASS.

EPITOME OF CASES.

Sec. 935. As to what constitutes trespass and who may maintain the action. As to what constitutes forcible trespass, see *State* v. *Childs*, 119 N. C. 858 (26 S. E. Rep. 36). One having the legal title to real estate and the right to possession, who takes possession without committing a breach of the peace, is not a trespasser. *Burke* v. *Douglass*, 115 Mich. 197 (73 N. W. Rep. 133). Actual possession of land will

sustain trespass as against any one but the true owner entitled to possession or one acting under him. *Clay* v. *City of St. Albans*, 43 W. Va. 539 (27 S. E. Rep. 368; 64 Am. St. Rep. 883). To sustain *quare clausum fregit*, the plaintiff must have constructive possession emenating from legal title, or he must have actual physical possession. *High's Heirs* v. *Pancake*, 42 W. Va. 602 (26 S. E. Rep. 536). Trespass to real property cannot be maintained unless the plaintiff has actual or constructive possession of the property where the trespass was committed, and never when the possession of the property was in the defendant. *Newcomb* v. *Love*, 112 Mich. 115 (70 N. W. Rep. 443). Under Ky. Stat. 1894, § 2361, an action for trespass upon land may be maintained by the owner although he was not in possession of the land when the injury was committed. Title by adverse possession is sufficient to sustain the action. *Coppage* v. *Griffith*, Ky. (40 S. W. Rep. 908). A homestead settler upon public lands of the United States may maintain an action for trespass, after his entry and before his right to a patent becomes absolute. *Culbertson Irr. & Water-Power Co.* v. *Olander*, 51 Neb. 589 (71 N. W. Rep. 298). One claiming under an invalid lease who merely enters upon the premises and changes the locks on the buildings has not such possession as will make it a trespass for the authorized agent of the owner of the property to peaceably take possession. *Ryan* v. *Sun Sing Chow Poy*, 164 Ill. 259 (45 N. E. Rep. 497). One whose land does not touch the shore of any lake or stream, cannot maintain trespass against another for cutting grass on wild, uninclosed, adjoining marsh land, which belongs to the United States. *Stark* v. *Miller*, 118 Mich. 465 (71 N. W. Rep. 876). A married woman, or she and her husband may maintain an action for trespass to her separate estate, although the legal title thereto is held by a trustee, where she is permitted to have possession and use of the land. *Clay* v. *City of Albans*, 43 W. Va. 539 (27 S. E. Rep. 368; 64 Am. St. Rep. 883). La. Rev. Stat. 1870, § 822—definition of trespass and penalty therefor—amended and re-enacted, Laws 1899, p. 448.

Sec. 936. Practice in actions for trespass. In an ordinary action of trespass, it is not necessary to allege a

malicious intent, and if alleged it need not be proved. *Neal* v. *Smith*, 89 Me. 596 (36 Atl. Rep. 1058). The lessees of a mine may properly join as plaintiffs in an action of trespass against a third party. *United Coal Co.* v. *Canon City Coal Co.*, 24 Colo. 116 (48 Pac. Rep. 1045). Proof of the trespass entitles the plaintiff to nominal damages and it is error to decree a nonsuit because no damages are proven. *Lance* v. *Apgar*, 60 N. J. L. 447 (38 Atl. Rep. 695). Where a trespass is admitted or proven, the presumption in the absence of evidence to the contrary is that it was willful and the burden is on the trespasser to show that it was not. *Mississippi River Logging Co.* v. *Page*, 68 Minn. 269 (71 N. W. Rep. 4). Upon an indictment for entry upon land after being forbidden, under N. C. Code, § 1120, when the entry after being forbidden by the party in possession is shown or admitted, the burden devolves upon the defendant to show that he entered under a *bona fide* claim of right. It is not sufficient merely to testify that he believed that he had the right to enter, but he must show that he had reasonable grounds for such belief. *State* v. *Durham*, 121 N. C. 546 (28 S. E. Rep. 22). Particular evidence held sufficient to sustain plaintiff's title. *Humes* v. *Proctor*, 151 N. Y. 520 (45 N. E. Rep. 948). Particular evidence held insufficient to sustain a verdict for damages for trespass on land. *Meyers* v. *Savery*, 19 Mont. 329 (48 Pac. Rep. 890). For case depending upon particular question as to the admissibility of evidence, see *Taylor* v. *Corley*, 113 Ala. 580 (21 So. Rep. 404). As to the applicability of particular instructions, see *Zundel* v. *Baldwin*, 114 Ala. 328 (21 So. Rep. 420); *McCusker* v. *Mitchell*, R. I. (36 Atl. Rep. 1128).

Sec. 937. Measure of damages. One willfully trespassing upon coal lands is liable for the full value of the coal taken. *United Coal Co.* v. *Canon City Coal Co.*, 24 Colo. 116 (48 Pac. Rep. 1045). The measure of damages for the wrongful digging of ditches upon land is the cost of filling them up and restoring the premises to their original condition. *Doss* v. *Billington*, 98 Tenn. 375 (39 S. W. Rep. 717). How. Ann. Mich. Stat., § 7959, construed and applied—measure of damages in trespass for cutting timber—recovery of treble damages and interest. *Gates* v. *Comstock*, 113 Mich. 127 (71

N. W. Rep. 515). Miss. Code 1892, § 4412, applied—recovery of exemplary damages. *Keystone Lum. & Imp. Co.* v. *McGrath*, Miss. (21 So. Rep. 301). N. Y. Code Civ. Proc., §§ 1667, 1668, applied—recovery of triple damages. *Humes* v. *Proctor*, 151 N. Y. 520 (45 N. E. Rep. 948).

TRUSTS.

EPITOME OF CASES.

Sec. 938. Creation of express trusts — Validity. A deed, granting to a committee of and in behalf of a certain cemetery, certain land, to be held "in behalf of the said corporation for their use and behoof, forever," although the words, "in trust" or "trustees" are not used, constitutes a deed in trust for such corporation. *Packard* v. *Old Colony R. Co.*, 168 Mass. 92 (46 N. E. Rep. 433). Where one before a judicial sale agrees to buy in the land in his name for the benefit of the debtor, the debtor to pay the purchase money and keep the land, this is an express trust, enforcible in equity. A second sale under decree, and purchase by the same purchaser will not defeat the trust. *Currence* v. *Ward*, 43 W. Va. 367 (27 S. E. Rep. 329). Where the father, being the owner of the equitable estate in land, directs the conveyance of the legal title to his son in trust for the father, and in the deed the grantee is designated as trustee, both the deed and the instructions for its execution are competent evidence to prove the trust, in an action for its enforcement against the son, who denies the trust and claims the coveyance was a gift or advancement. *Paddock* v. *Adams*. 56 O. St. 242 (46 N. E. Rep. 1068). A devise by a wife, who leaves a surviving father, to her husband which provides "but it is my wish and desire that he shall furnish a home, maintenance and care for my said father during life should he need and require it" imposes upon the husband accepting the devise a binding trust. *Foster* v. *Wilson*, N. H. (38 Atl. Rep. 1003). Particular agreement entered into by

the purchasers of land construed and held to be an executed declaration in trust. *Gildersleeve* v. *Stratton*, N. J. Eq. (36 Atl. Rep. 477). Particular evidence held sufficient to establish an express trust in land. *Tennant* v. *Tennant*, 43 W. Va. 547 (27 S. E. Rep. 334). Where a trust deed executed for the benefit of the grantor's creditors requires the trustee to continue the grantor's business, making the expense incident thereto and an allowance of compensation to the trustee charges superior to those of the creditors secured, on account of which the object of the trust may be defeated and postponement of the creditors thereby secured, the deed will be held null and void as being fraudulent in law. *Catt* v. *Wm. Knabe & Co. Mfg. Co.*, 98 Va. 746 (26 S. E. Rep. 246). Where a son's conveyance of all his property to his father, in trust, was procured by the latter's undue influence, a reconveyance by him to the son will be sustained. *Ewing* v. *Bass*, 149 Ind. 1 (48 N. E. Rep. 241).

Sec. 939 Parol evidence to establish express trusts. In West Virginia an express trust in lands may be created, declared, or proven by parol evidence, provided the agreement creating the trust is made before the legal title is conveyed to the trustee. *Currence* v. *Ward*, 43 W. Va. 367 (27 S. E. Rep. 329). A voluntary conveyance by a husband to his wife without consideration, untainted with fraud, even with an oral agreement that she shall hold the land in trust, does not create a trust which can be enforced. *Fitzgerald* v. *Fitzgerald*, 168 Mass. 488 (47 N. E. Rep. 431). The fact that the wife obtains a divorce from her husband after he has made an absolute conveyance of real estate to her, does not authorize the admission of parol evidence to establish a trust as to such real estate in such wife for their mutual benefit. *Handlan* v. *Handlan*, 42 W. Va. 309 (26 S. E. Rep. 179). Where in an action involving the determination of the nature of his title, one claiming under an absolute deed and all the parties interested admit that the conveyance was made for the purpose of creating an express trust the terms of which rest in parol, the statute of frauds is waived and the trust may be established by parol. *Myers* v. *Myers*, 167 Ill. 52 (47 N. E. Rep. 309). Under Ill. Rev. Stat., ch. 59, § 9, an express trust in lands is

not enforcible unless evidenced by writing. *Godschalck* v. *Fulmer*, Ill. (45 N. E. Rep. 809); 176 Ill. 64 (51 N. E. Rep. 852). The same is held in Iowa, applying Code, § 2918. *Keller* v. *Strong*, 104 Ia. 585 (73 N. W. Rep. 1071). Applying McClain's Ia. Code, § 3105, requiring all declarations of trust affecting real estate to be in writing, it is held that where the holder of a decree of foreclosure makes a written assignment thereof, absolute on its face, he cannot show by parol that the assignee holds the mortgaged premises, subsequently purchased under the decree, in trust for him. *Hemstreet* v. *Wheeler*, 100 Ia. 290 (69 N. W. Rep. 521). Applying Maine Rev. Stat., ch. 73, § 11, providing that "there can be no trust concerning lands, except a trust arising by implication of law, unless created or declared by some writing signed by the party or his attorney," it is held that where a mother when sick conveyed her interest in certain real estate to her daughter by an absolute deed of warranty, a trust cannot be established by parol proof of an understanding that if the grantor recovered and wanted her interest back, the daughter would reconvey it to her. *Wentworth* v. *Shibles*, 89 Me. 167 (36 Atl. Rep. 108). Applying Mo. Rev. Stat. 1889, § 5184, providing that "all declarations or creations of trust or confidence in any lands, tenements, or hereditaments, shall be manifested and proved by some writing required by the party," it is held that a grantor in a general warranty deed cannot establish a trust by parol in his favor in the absence of fraud or mistake, although the parties to the deed are partners. *Rogers* v. *Ramey*, 137 Mo. 598 (39 S. W. Rep. 66). Under Wis. Rev. Stat., § 2302, a trust in lands can be created and provided only by an instrument in writing. A parol trust is void at the election of the trustee and the courts will not interfere to compel him to execute it. *Krouskop* v. *Krouskop*, 95 Wis. 296 (70 N. W. Rep. 475).

Sec. 940. Statute of uses and passive trusts. The statute of uses has no application to a deed absolute on its face. *Myers* v. *Myers*, 167 Ill. 52 (47 N. E. Rep. 309). A devise to testator's executors for the benefit of certain named children is equivalent to a devise of the land itself. *Barclay* v. *Platt*, 170 Ill. 384 (48 N. E. Rep. 972). Where a mere

naked power to exercise a discretion is given by a will to two or more persons as trustees, the death of one of them before the will takes effect renders the trust void. *Hadley* v. *Hadley*, 147 Ind. 423 (46 N. E. Rep. 823). A conveyance to trustees which passes to them simply the legal title to be conveyed on certain contingencies with no power to control the property or receive the rents and profits, creates such a passive trust as was abolished by S. & B. Ann. Wis. Stat., § 2071; and under §§ 2073, 2075, the deed will be treated as if no trustees were named and as if the grant was in direct terms to the beneficiaries, and will be held to vest in them legal estates "of the same quality and duration and subject to the same conditions" as the beneficial interests. *Tyson* v. *Houghton*, 96 Wis. 59 (71 N. W. Rep. 94). Where the trust requires the trustee to pay the tax upon the property, the necessary expense of keeping it in repair, and to rent it in case it is not occupied by the beneficiary, the trust is an active one. *Carney* v. *Byron*, 19 R. I. 283 (36 Atl. Rep. 5).

Sec. 941. Spendthrifts' trusts. Where the testator devised the portion of his son K. in the residue of his estate to trustees to pay over the income to him or his wife or children "so the said K. and his wife and children may at all times have a comfortable support provided for them, out of said property," it is held that a spendthrift's trust was created which was terminated upon the death of K. and his wife, the fee vesting in his children. *King* v. *King*, 168 Ill. 278 (48 N. E. Rep. 582).

Sec. 942. Power of court in respect to trusts. Where a trust is an active continuing one, a court of equity will appoint a trustee to administer it, if the trustee designated in the instrument refuses to act. *In re Hemphill's Estate*, 180 Pa. St. 95 (36 Atl. Rep. 409). A court of equity may appoint a trustee to fill a vacancy in a deed of trust to secure debts, where the beneficiary, the only person having power to appoint a successor by the terms of the instrument, is dead. *Converse* v. *Davis*, 90 Tex. 462 (39 S. W. Rep. 277). Where a trustee in a deed for the benefit of creditors dies pending an action by him to enforce the trust, the court may appoint a

successor and substitute him as plaintiff in the action. *Tuttle* v. *Merchants' Nat. Bank*, 19 Mont. 11 (47 Pac. Rep. 203). Citing, *Gorsuch* v. *Briscoe*, 56 Md. 578; *Batesville Institute* v. *Kauffman*, 18 Wall. 151. Where a will devising an absolute estate to a devisee, appoints a trustee for her on account of her being mentally and physically incompetent to manage the estate, upon her becoming competent to manage the same, a court of equity may remove the trustee and turn the estate over to her. Du Relle, J., dissenting. *Webster* v. *Bush*, Ky. (39 S. W. Rep. 411; 42 S. W. Rep. 1124). Construing Pa. Act, April 18, 1853 (Pub. Laws, 503), authorizing a court to decree a sale where property is held in trust, and "one or more persons required to consent * * * unreasonably withhold consent," is held to authorize a decree for a lease by executors holding in trust for a period of fifty years, where it appears that such lease does not contravene any express direction of the testator and is beneficial to those interested in the estate. Sterrett, C. J., and Williams, J., dissenting. *In re Freeman's Estate*, 181 Pa. St. 405 (37 Atl. Rep. 591; 59 Am. St. Rep. 659).

Sec. 943. Practice in actions affecting trusts. In an action to enforce an express trust, the trustee is entitled to have all the persons having any possible interest in the estate made parties, including the holders of bonds secured by subsequent trust deed covering a part of the property. *Carter* v. *Uhlein*, N. J. Eq. (36 Atl. Rep. 956). Proceedings for the appointment of a successor to a trustee are not binding upon persons having an interest in the trust who are not made parties thereto. *Simmons* v. *McKinlock*, 98 Ga. 738 (26 S. E. Rep. 88). In suits respecting trust property brought either by or against a trustee, the trustees and the beneficiaries are necessary parties. *Dubs* v. *Egli*, 167 Ill. 514 (47 N. E. Rep. 766). The wife of a grantor in a trust deed, may join with him in an action to compel a trustee to perform his duties, where she has subsequently acquired an interest in the trust estate in her own right. *Carter* v. *Uhlein*, N. J. Eq. (36 Atl. Rep. 956).

Sec. 944. Powers, duties and liabilities of trustees. Successors to trustees named in a trust deed when lawfully

appointed have the same title to the property conveyed and power to execute the trust as the original trustees. *Craft* v. *Indianapolis D. & W. Ry. Co.*, 166 Ill. 580 (46 N. E. Rep. 1132). Where a deed confers on a trustee a special personal trust, it does not pass to his successor. *Simmons* v. *McKinlock*, 98 Ga. 738 (26 S. E. Rep. 88). The trustee of a naked legal trust, cannot compromise or yield a right already accrued to the *cestui que trust* without his consent. *Bizzell* v. *McKinnon*, 121 N. C. 186 (28 S. E. Rep. 271). Where an active, continuing trust was created in reference to a large tract of unproductive land in a city, for the purpose of providing for the support of the beneficiaries, and the instrument gave the trustee express power to change the investment or "to pledge, mortgage, sell or exchange or otherwise dispose of all or any portion of the real estate and personal property as he may deem best," it is held that the trustee had power to borrow money for the improvement of the property and to secure its payment by deed of trust thereon. *Bailie* v. *Carolina Interstate Bldg. & L. Ass'n*, 100 Ga. 20 (28 S. E. Rep. 274). Where a trustee sells the lands of his beneficiary and pays the proceeds of the sale over to him, he is not liable to the holder of a recorded judgment, which was a lien upon the beneficiary's equitable estate, and of which he had no actual notice before he parted with the money. He is not bound to search the records for such judgment. *Bartz* v. *Paff*, 95 Wis. 95 (69 N. W. Rep. 297; 37 L. R. A. 848). For an extensive discussion of the powers, duties and liabilities of a trustee in reference to improvements, insurance and repairs, see *Stevens* v. *Melcher*, 152 N. Y. 551 (46 N. E. Rep. 965). McClain's Ia. Code, § 3550, construed and applied—duty of trustee appointed by the court to give bond. *Sneer* v. *Stutz*, 102 Ia 462 (71 N. W. Rep. 415).

Sec. 945. Sale and conveyance by trustee. Where a trustee, with a power of sale, is directed upon the happening of a certain event to "immediately" pay over, "transfer, and convey" the estate to certain beneficiaries, it is held that the use of the word "immediately" does not necessarily terminate the trust upon the happening of the event specified and a sale may be made afterwards. *Rhode Island Hosp.*

Trust Co. v. *Harris*, 20 R. I. 160 (37 Atl. Rep. 701). Where a grantor's trust deed executed for the benefit of his wife, provided that if she should die before the grantor the land should vest in her surviving children, and, if the grantor dies first, the trust shall cease, it was held that the estate was only for the joint lives of the grantor and the beneficiary, and although the instrument required the trustees to execute such leases, conveyances, contracts and agreements in reference to said premises or any part thereof, as the wife shall in writing request, they cannot convey the fee. *Walton* v. *Follansbee*, 165 Ill. 480 (46 N. E. Rep. 459). Where a conveyance of property to a trustee for the sole use of a married woman, empowered him to sell, convey and assign the property for the purpose of reinvestment only on the written request of such married woman and her husband, the trustee to hold on the same trusts the proceeds of the sale or any property purchased therewith, it is held that the power of reinvestment given by the deed once having been exercised, is not exhausted, and can be again exercised, as to the property in which the investment was made. *Hayes* v. *Applegate*, Ky. (39 S. W. Rep. 436). Where a trustee makes an unauthorized sale of the trust property to an innocent purchaser, he will be held to account to the *cestui que trust* for its value; but where such a sale is made to a purchaser with notice of the rights of the *cestui que trust*, he may elect to proceed against the trustee or such purchaser. The measure of damages for an unauthorized sale of a portion of the trust property is the value of the part sold, unless its sale operates to depreciate the value of the remainder. *Silliman* v. *Gano*, 90 Tex. 637 (39 S. W. Rep. 559).

Sec. 946. Title of purchaser from trustee. A purchaser from a trustee takes subject to the limitations upon his power to convey which are disclosed by his recorded title. *McDonald* v. *Quick*, 139 Mo. 484 (41 S. W. Rep. 208). If a purchaser have notice of an actual or intended misappropriation of the consideration, and especially if such misappropriation appear upon the face of the deed conveying a trust estate, the purchaser cannot get a good title. But where there is no notice, actual or constructive, of such misappro-

priation, and the conveyance on its face conforms to the terms of sale contained in the deed creating the trust, the purchaser will get a good title. *Harris* v. *Smith*, 98 Tenn. 283 (39 S. W. Rep. 343). Where a grantor conveyed land to a trustee to pay the rents to the grantor's wife during her life, with remainder to her children if the land had not previously been disposed of under a power of sale given in the deed, which authorized the trustee to sell upon request of the wife, it is held that a purchaser from the trustee at a sale regularly made under such power, took the estate free from any trust in favor of the children. *Durr* v. *Wilson*, 116 Ala. 125 (22 So. Rep. 536). Under Ky. Stat. 1894, §§ 4707, 4846, a purchaser of trust property is not required to look to the application of the purchase money unless so provided in the instrument. *Hays* v. *Applegate*, Ky. (39 S. W. Rep. 436).

Sec. 947. Trustees' dealings with trust estates. When a trust is once established, no subsequent dealing with the property by the trustee can alter the relation between the parties or relieve the property of its trust character. *Cox* v. *Cox*, 95 Va. 173 (27 S. E. Rep. 884). Where a mortgagee becomes a trustee of the mortgagor under an agreement to convert the property into money and apply it to the benefit of the mortgagor's creditors, he cannot purchase the property for his own benefit at a foreclosure sale thereof. *Hamilton* v. *Dooly*, 15 Utah 280 (49 Pac. Rep. 769). See opinion for discussion of this subject. A purchase of the trust estate by the trustee may be confirmed by long acquiescence on the part of the beneficaries coupled with their acceptance of the proceeds of the sale. *Kahn* v. *Chapin*, 152 N. Y. 305 (46 N. E. Rep. 489). A guardian, who indirectly purchases lands in which his wards have an interest, at a partition sale thereof, will be held to account to their estate for any profit realized upon subsequent sale of such lands, although they are sold in connection with other land in which they have no interest. *In re Jones' Estate*, 179 Pa. St. 36 (36 Atl. Rep. 175). Only the ward can complain of his guardian's violation of his trust in purchasing the trust lands at an execution sale thereof. *Peadro* v. *Carriker*, 168 Ill. 570 (48 N. E. Rep. 102). Where, at a public sale of property donated to a school dis-

trict, made by its trustees, it was agreed in writing that if the property should be recovered by a vendee of the donor, the sale should be treated as void, one of the trustees purchasing at such sale with the knowledge of the others, to whom a warranty deed is made, is not prohibited from availing himself of the benefit of such agreement on account of his trust relation. *Trustees of Common School Dist. No. 2* v. *Conrad*, Ky. (39 S. W. Rep. 497).

VENDOR AND VENDEE.

EPITOME OF CASES.

Sec. 948. As to what constitutes a contract of sale —Particular cases. Where the terms of the vendor's written offer of sale are accepted and complied with by the vendee the contract is binding and may be enforced. *Bogle* v. *Jarvis*, 58 Kan. 76 (48 Pac. Rep. 558). Particular instrument held to be an absolute contract of sale and not an option. *Monongah Coal & Coke Co.* v. *Fleming*, 42 W. Va. 538 (26 S. E. Rep. 201). Particular transactions held insufficient to constitute a complete contract of purchase. *Connor* v. *Buhl*, 115 Mich. 581 (73 N. W. Rep. 821). Particular contract of sale of real estate made to a corporation by a director thereof, held not invalid on account of the violation of his trust relation. *Stetson* v. *Northern Inv. Co.*, 104 Ia. 393 (73 N. W. Rep. 869). Particular evidence examined and held insufficient to show an oral contract between a son and his father and mother for the transfer of land to him. *McDonald* v. *Basom*, 102 Ia. 419 (71 N. W. Rep. 341). Particular evidence examined and held insufficient to show delivery of a contract for the sale of land. *Myrick* v. *Segar*, 102 Ia. 749 (72 N. W. Rep. 298).

Sec. 949. Rights and liabilities of vendor and vendee—Miscellaneous notes. A vendor's accrued right to recover damages does not pass to his vendee. *City of Huntsville* v. *Ewing*, 116 Ala. 576 (22 So. Rep. 984). It is held that a vendee of a city lot abutting on a street may maintain

an action for damages for the continuance of a railroad previously constructed therein, under a permit from the city, subject to the rights of adjacent lot owners, although no right to recover damages had been assigned to him by his vendor. *Hoffman* v. *Flint & P. M. R. Co.*, 114 Mich. 316 (72 N. W. Rep. 167). Where a vendee gave a trust deed to secure the purchase price and a bond in which he obligated himself to erect buildings of a specified value on the land, the measure of damages for the breach of such bond is the difference between the value of the land at the time of the breach with and without the buildings. *United Real Estate Co.* v. *McDonald*, 140 Mo. 605 (41 S. W. Rep. 913). Where several vendors have contracted to convey land to a third person they cannot, by contract or conveyance among themselves, release any of their number from the obligation to respond to the vendee for damages arising from a breach of the contract. *Seaver* v. *Hall*, 50 Neb. 878 (70 N. W. Rep. 378). A conveyance by a vendee to the assignee of his purchase money note does not create an implied obligation on the part of the grantee to refund a payment made on the note or to make compensation for the improvements because it recites that it is made "in payment of the purchase money." *Weil* v. *Flowers*, 121 N. C. 133 (28 S. E. Rep. 191). The fact that a vendor procures an attornment from the tenant of an assignee of his vendee occupying under a lease, executed after a default in the contract of purchase which would authorize its forfeiture, does not affect the possessory rights of the lessor, as such an attornment is void. *Perkins* v. *Potts*, 52 Neb. 110 (71 N. W. Rep. 1017). As a general rule where the vendor of land in an executory contract wrongfully keeps the vendee out of possession, the latter is entitled to recover damages for the withholding of the premises from him, or for use and occupation for the time he is so kept out of possession; and, if he does recover any such damages, the vendor is entitled to recover interest on the unpaid purchase money for the same time. *Abrahamson* v. *Lamberson*, 68 Minn. 454 (71 N. W. Rep. 676). Citing, *Bostwick* v. *Beach*, 103 N. Y. 414 (9 N. E. Rep. 41); *Covell* v. *Cole*, 16 Mich. 223. Where one agrees with a vendor to protect him in an action to establish his title to certain land and to pay the costs of the same if it goes

against him, and to purchase the land at a specified sum if it goes in his favor, the proposed vendor is entitled to sufficient time to exhaust all of his legal remedies, and the fact that the speculative value of the property to the vendee is less before the litigation is finally determined, does not affect the rights of such vendor where he was in no manner responsible for such results. *Central Land Co.* v. *Johnston*, 95 Va. 223 (28 S. E. Rep. 175). Applying La. Rev. Civ. Code, arts. 2042, 3301, it is held that the dissolution of a sale by a vendor for the nonpayment of the price, will not affect mortgages created by the purchaser except to subordinate the mortgages to the right of the unpaid vendor to dissolve the sale, hence, if in dissolving the sale the vendor is condemned to restore the value of the improvements on the property, a fund arising from the improvements in excess of the price and revenues to which the vendor is entitled, will be subjected to the mortgage created by the purchaser during his ownership. *Succession of Phillips*, 49 La. 1019 (22 So. Rep. 202). Wisconsin has a new statute regulating the execution of the conveyance of lands pursuant to a contract held by a deceased person. Laws 1899, p. 9.

Sec. 950. Rights and liabilities of vendor and vendee as to taxes. Where a vendor surrenders possession of the premises sold, and the vendee obtains possession and the use, and the vendor covenants to execute a conveyance or warranty deed, free and clear of all incumbrances, when the purchase money is paid or secured, the vendee is liable for the taxes assessed upon such premises after his taking possession under the contract, and he cannot require a covenant in the deed to him against a lien for such taxes. *Williamson* v. *Neeves*, 94 Wis. 656 (69 N. W. Rep. 806). Citing, *Miller* v. *Corey*, 15 Ia. 166; *Light* v. *West*, 42 Ia. 138; *Meyer* v. *County of Dubuque*, 49 Ia. 195; *Spangler* v. *York Co.*, 13 Pa. St. 327; *Farber* v. *Purdy*, 69 Mo. 601; *Manufacturing Co.* v. *Jenkins*, 47 Mo. App. 664; *Brown* v. *Brown*, 124 Mo. 85 (27 S. W. Rep. 552); *Willard* v. *Blount*, 11 Ired. 624. A vendor voluntarily paying taxes, not delinquent, pending an action by his vendee for rescission, cannot subsequently recover such payment from the vendee who is thereafter adjudged not entitled

to a rescission. *Garbes* v. *Roberts*, 98 Wis. 178 (73 N. W. Rep. 995).

Sec. 951. Construction of land contracts—Forfeitures. A vendor who has put it out of his power to perform his contract cannot enforce a forfeiture against his vendee. *Mc Whirter* v. *Crawford*, 104 Ia. 550 (72 N. W. Rep. 505). Where the contract provides the manner in which a forfeiture may be asserted, a forfeiture cannot be asserted except in the manner specified. *Auxier* v. *Taylor*, 102 Ia. 673 (72 N. W. Rep. 291). Where, after giving his vendee notice of forfeiture, a vendor brings an action to foreclose his vendor's lien, he thereby waives any meditated forfeiture. *Old Second Nat. Bank* v. *Alpena Co. Sav. Bank*, 115 Mich. 548 (73 N. W. Rep. 809). Particular contract construed in which the right to enforce a forfeiture for the vendee's failure to make payments was held to be optional with the vendor. *Steel* v. *Long*, 104 Ia. 39 (73 N. W. Rep. 470). A provision in a contract that it shall be void as to the vendor if the vendee shall fail to make certain payments at specified times, gives only the vendor the right to insist upon a forfeiture, and performance is not optional with the vendee. *Westervelt* v. *Huiskamp*, 101 Ia. 196 (70 N. W. Rep. 125). Where a vendee, who has paid a part of the purchase price, executed his notes for the remainder and entered into possession under a contract which does not make the nonpayment of such notes at maturity or otherwise a ground of forfeiture or rescisson of the contract, his vendor cannot lawfully reenter and take possession of the property on account of his nonpayment of the notes. *Usher* v. *Hollister*, 58 Kan. 431 (49 Pac. Rep. 525). Where the vendor in the contract for the sale of real property is required by the terms thereof to give written notice to the vendee of his election to treat the contract as terminated on failure of the vendee to pay at the time specified therein, time being declared to be of the essence of the agreement, such vendor must act with diligence in giving such notice, or he will be deemed to have waived his right to insist that the vendee has lost his rights in equity on account of such breach. *Fargusson* v. *Talcott*, 7 N. Dak. 188 (73 N. W. Rep. 207). Although time is made the essence of the contract, when a

vendor has waived his right to a strict performance, he must give such notice of his intention to declare a forfeiture as will give reasonable time and opportunity to the vendee to perform. *Mo* v. *Bettner*, 68 Minn. 179 (70 N. W. Rep. 1076). Although time be made of the essence of the contract, yet if the party to whose benefit such provision inures, subsequent to the time when a forfeiture would occur under such provision, by deliberate acts recognizes the contract as still subsisting, such conduct will amount to a waiver of his right to enforce a forfeiture. *Shouse* v. *Doane*, 89 Fla. 95 (21 So. Rep. 807). Citing, *Dana* v. *Investment Co.*, 42 Minn. 194 (44 N. W. Rep. 55); *Paulman* v. *Cheney*, 18 Neb. 392 (25 N. W. Rep. 495); *Ballard* v. *Cheney*, 19 Neb. 58 (26 N. W. Rep. 587); *Cheney* v. *Libby*, 134 U. S. 68 (10 Sup. Ct. Rep. 498). Particular case in which a vendee was held not entitled to relief against a forfeiture of a bond for a deed. *Boulder & B. Placer Co.* v. *Maxwell*, 24 Colo. 87 (48 Pac. Rep. 815)

Sec. 952. Construction of land contracts—Particular cases. Construing an offer to sell "surface rights" of a certain tract of land at so much per acre, it is held that if the term "surface rights" has a definite meaning, it must be a right to a fee in the lands subject to a reservation of the minerals in the grantor; and a tender of a contract providing that the vendor should have the right to enter on the land, explore for ore and carry on the business of mining and for such purposes to take so much of the land, and for such time, as he shall deem expedient, paying the vendee stipulated damages therefor, is not in accordance with the offer. *Keweenaw Ass'n* v. *Friedrichs*, 112 Mich. 442 (70 N. W. Rep. 896). For construction of contract between a vendor and vendee as to the right to receive the rent under a gas lease, see *Binford* v. *Thomas*, 18 Ind. App. 330 (47 N. E. Rep. 1075). For construction of a particular contract as to liability of the vendor on his guaranty to furnish a tenant for the premises sold, who would pay the specified rent, see *McDougald* v. *Argonaut L. & Devp. Co.*, 117 Cal. 87 (48 Pac. Rep. 1021). For construction of particular land contracts as to the rights of the parties thereunder, see *Proctor* v. *Plumer*, 112 Mich. 393 (70 N. W. Rep. 1028); *Forbes* v. *Forbes*, 112 Mich. 630 (71

N. W. Rep. 171); *Auxier* v. *Taylor*, 102 Ia. 673 (72 N. W. Rep. 291); *Koshland* v. *Spring*, 116 Cal. 689 (48 Pac. Rep. 58); *Hunt* v. *Stockton Lum. Co.* 113 Ala. 387 (21 So. Rep. 454); *Brown* v. *Massey*, 138 Mo. 519 (38 S. W. Rep. 939); *Heman* v. *Wade*, 140 Mo. 340 (41 S. W .Rep. 740).

Sec. 953. Bond for title. A vendor in a bond for title is not authorized to convey to the widow of his deceased vendee upon her payment of the purchase money notes. *Starkey* v. *Gunn*, 64 Ark. 201 (41 S. W. Rep. 419). A purchaser of land in possession under a title bond, is treated as the equitable owner of the land and he may mortgage, sell, or devise his interest in it; and title subsequently acquired by him will pass to his mortgage or vendee. *Skaggs* v. *Kelly*, Tenn. (42 S. W. Rep. 275).

Sec. 954. Deficiency in quantity and defective title. A vendee cannot rescind a contract on account of a deficiency in the title existing at the time of the sale, where there was no fraud, and the vendor who is solvent, tenders a warranty deed curing the defect. *Coleman* v. *First Nat. Bank*, 115 Ala. 307 (22 So. Rep. 84). No cause of action arises in favor of a grantee of land who has been evicted under title paramount, against his vendor who made no covenant or representations as to title and was guilty of no fraud. *Baker* v. *Savidge*, 53 Neb. 146 (73 N. W. Rep. 543); *Harrison* v. *Palo Alto Co.*, 104 Ia. 383 (73 N. W. Rep. 872). When a sale is in gross and not by the acre and there is no fraud, the purchaser takes at his own risk as to the quantity. *Skaggs* v. *Kelly*, Tenn. (42 S. W. Rep. 275). Every sale of real estate, where the quantity is referred to in the contract, and where the language of the contract does not plainly indicate that the sale was intended to be a sale in gross, must be presumed to be a sale per acre. While contracts of hazard are not invalid, courts of equity do not regard them with favor. The presumption is against them, and, while such presumption may be repelled, it can only be effectually done by clear and cogent proof. *Hull* v. *Watts*, 95 Va. 10 (27 S. E. Rep. 829). One who is induced to purchase and take a quitclaim deed of land from a county, to which it has no title, by the

fraudulent representations of its officers, purposely made, may recover from the county the consideration paid to it. *Nelson* v. *Hamilton Co.*, 102 Ia. 229 (71 N. W. Rep. 206). Where a vendor sold lots with reference to a plat which designated them as abutting upon unopened streets, was unable to open all the streets because he did not own them, it is held that the purchaser is entitled to an abatement of the price to the extent of the loss sustained by him, but that the contract should not be rescinded where the vendor was guilty of no fraud. *Leiker* v. *Henson*, Tenn. (41 S. W. Rep. 862).

Sec. 955. Actions to recover purchase money. A vendor is entitled to recover interest only from the date at which he tendered the deed and surrendered possession. *Meagher* v. *Puckett*, Ky. (42 S. W. Rep. 737). Where a delay in the action is occasioned by grant of time to the grantor to perfect his title, subsequent costs may properly be taxed against him. *Hurt* v. *Miller*, 95 Va. 32 (27 S. E. Rep. 831). Where fraud in the contract of sale is pleaded in bar to an action for the purchase money, the plea must aver the surrender of the land or some sufficient reason for not surrendering the same before the suit was brought. *Ansley* v. *Bank of Piedmont*, 118 Ala. 467 (21 So. Rep. 59; 59 Am. St. Rep. 122). Where a vendor agreed with his vendee that the payments of the purchase price should be applied in discharge of his purchase money debt due to his vendor, a pledgee of the obligations taking subject to such agreement, who failed to comply with it, on account of which the vendee failed to make further payments, cannot maintain an action to recover the balance of the purchase money from the vendee, without making or tendering to him a conveyance of the property. *Northwestern Nat. Bank* v. *Ramsey*, 96 Wis. 544 (71 N. W. Rep. 989). Upon the foreclosure of a land contract providing that all the rights of the purchaser shall be forfeited, in case of default, a vendor is entitled to have applied to his claim, the rents collected by a receiver, pending the action, and also to have a personal judgment for any deficiency. *Belding* v. *Meloche*, 118 Mich. 228 (71 N. W. Rep. 592).

Sec. 956. Defenses to actions for purchase money. Where the defense to an action for the price of land is fraudu-

lent representations made by the seller, it is error for the court to submit by instruction, the defense of mutual mistake. *Braunschweiger* v. *Waits*, 179 Pa. St. 47 (36 Atl. Rep. 155). The vendee of land who has accepted a deed with covenants of warranty, and gone into possession of the land, cannot defeat a recovery of the deferred payments of purchase money on the ground of a defect in the title, unless he has been induced to enter into the contract of purchase by fraud, or he has lost the land, held under the deed, by an eviction, or that which is tantamount thereto, with liability for mesne profits. *Mickler* v. *Reddick*, 38 Fla. 341 (21 So. Rep. 286); *Coleman* v. *First Nat. Bank*, 115 Ala. 307 (22 So. Rep. 84). To the same effect is the case of *Abner* v. *York*, Ky. (41 S. W. Rep. 309). It is no defense to an action for purchase money that the vendor made false representations as to improvements which would be made in the vicinity, unless it is made to appear that he had actual knowledge on the subject which the purchaser did not have and could not acquire by the exercise of ordinary diligence. *Clark* v. *Tanner*, 100 Ky. 275 (38 S. W. Rep. 11); *Ansley* v. *Bank of Piedmont*, 113 Ala. 467 (21 So. Rep. 59; 59 Am. St. Rep. 122). A grantee sued for the purchase price, may show that he took the conveyance under an agreement that he was to hold the title as trustee merely for the purpose of discharging incumbrances and effecting a sale to another, out of the proceeds of which he was to pay the plaintiff, which arrangement he was unable to consummate on account of the plaintiff repudiating the agreement and slandering the title, the result of which was that the property was sold under a mortgage foreclosure. *Hoefling* v. *Dobbin*, 91 Tex. 210 (42 S. W. Rep. 541). Where a vendee, who purchases land with knowledge of a previous sale of the trees thereon to another, pays part of the purchase price and gives his notes for the balance, he cannot, after five years of acquiescence, claim an abatement in the purchase price on account of his failure to get the trees. *Southwest Virginia Min. Land Co.* v. *Chase*, 95 Va. 50 (27 S. E. Rep. 826). Where a married woman seeks to enforce the payment of notes given for the purchase of land, the defendant may set off damages sustained through the false representations of her agent which she caused to be made, although at the time of the sale

and conveyance she could not bind herself by promissory contract or make herself liable in damages for a failure to comply with the contract. *Matney* v. *Ferrell*, 100 Ky. 361 (38 S. W. Rep. 494). In an action for purchase money, a court may properly allow the grantee damages occasioned by the grantor wrongfully destroying a shade tree on the premises conveyed and setting over a partition fence so as to inclose with his other land a strip thereof, subsequently to the sale. *Gaines* v. *Fagala*, Tenn. (42 S. W. Rep. 462).

Sec. 957. Recovery of purchase money paid by vendee—Vendee's lien. A vendee who has forfeited his contract by default in payments, cannot recover amounts which he has paid thereon. *Satterlee* v. *Cronkhite*, 114 Mich. 634 (72 N. W. Rep. 616). Money paid to a husband under his void contract to convey a homestead may be recovered. *De Kalb* v. *Hingston*, 104 Ia. 23 (73 N. W. Rep. 350). A vendee entitled to a rescission of an executory contract on account of the vendor's inability to convey a good title, is entitled to recover the payments he has made pursuant to the terms of the contract, with interest. *Maxwell* v. *Gregory*, 53 Neb. 5 (73 N. W. Rep. 220). In such an action it is not competent for the defendant to show his own solvency or that he has been empowered by virtue of negotiations with the holder of the outstanding title to make a good and sufficient warranty deed, no such ability or readiness having been averred in his answer. *Maxwell* v. *Gregory*, 53 Neb. 5 (73 N. W. Rep. 220). Where one seeks to recover the purchase money paid by him for land, treating the contract of sale as rescinded, he must account for the value of the use thereof while he was in possession. *Todd* v. *Leach*, 100 Ga. 227 (28 S. E. Rep. 43). A vendee who is at fault in failing to complete his contract, cannot recover payments of the purchase price which he has made, although the contract does not provide for a forfeiture. *Downey* v. *Riggs*, 102 Ia. 88 (70 N. W. Rep. 1091). Where, in an action for possession by a vendor on account of vendee's failure to complete the payment of the purchase price, a demand by the defendant for repayment of the purchase money debt and compensation for improvements, is not such a counterclaim as will prevent plaintiff from tak-

ing a nonsuit. *Rumbough* v. *Young*, 119 N. C. 567 (26 S. E. Rep. 148). Where a vendee cannot have specific performance on account of the statute of frauds, he may enforce a lien for partial payments of the purchase money. *Devore* v. *Devore*, 138 Mo. 181 (39 S. W. Rep. 68).

Sec. 958. Reserving title to secure purchase money. A purchaser of land stands in the position of a mortgagor as to the purchase money where the title has been reserved, and the vendor has two remedies, one *in personam* and one *in rem*. *First Nat. Bank v. Pearson*, 119 N. C. 494 (26 S. E. Rep. 46). A vendor of real estate who retains the legal title as security for the payment of purchase money may, by subsequent oral contracts with the purchaser, annex further conditions to his obligation to convey; and they will be enforced in equity against a mortgagee of the purchaser who acquires his interest after such further conditions have been annexed and while the legal title remains in the vendor. *Allemania Loan & Bldg. Co., No. 2* v. *Frantzreb*, 56 O. St. 493 (47 N. E. Rep. 497).

Sec. 959. Vendor's lien—Creation of and who may enforce. A vendor's lien for purchase money is an implied equitable right of the vendor to resort to the property in case the purchase money is not paid. It is not the result of any agreement and a lien created by express written contract or agreement between the vendor and vendee is not a vendor's lien. It is a security more in the nature of a mortgage. *McKeown* v. *Collins*, 38 Fla. 276 (21 So. Rep. 103). Citing, *Wright* v. *Troutman*, 81 Ill. 374. In Alabama it is not necessary that a vendor's lien be reserved; it arises from a sale on credit and a conveyance of the land. *Knight* v. *Knight*, 118 Ala. 597 (21 So. Rep. 407). A vendor's lien does not exist in Washington where land is conveyed by an absolute deed, in the absence of an express agreement creating it. *Smith* v. *Allen*, 18 Wash. 1 (50 Pac. Rep. 783; 63 Am. St. Rep. 864; 39 L. R. A. 82). See Ballards' Law of Real Property, Vol. V, §§ 952-954. The same rule is established in West Virginia, Code, ch. 75, § 1. *Scraggs* v. *Hill*, 43 W. Va. 162 (27 S. E. Rep. 310). A deed reserving a vendor's lien should describe

the debt so as to identify it. *Goff* v. *Price*, 42 W. Va. 884 (26 S. E. Rep. 287). A vendor of real estate may create a lien thereon and charge the same with his support and maintenance by using express words to that effect, but an implied equitable lien does not exist in favor of a vendor of real estate to secure the consideration therefor, when such consideration is his maintenance and support during life. *Crim* v. *Holsberry*, 42 W. Va. 667 (26 S. E. Rep. 314). Citing, *McCandlish* v. *Keen*, 13 Grat. 615; *Brawley* v. *Catron*, 8 Leigh 522; *Arlin* v. *Brown*, 44 N. H. 102; *Hiscock* v. *Norton*, 42 Mich. 320 (3 N. W. Rep. 868); *McKillip* v. *McKillip*, 8 Barb. 552; *Chase* v. *Peck*, 21 N. Y. 581; *Meigs* v. *Dimock*, 6 Conn. 458; *Hobson* v. *Edwards*, 57 Miss. 128; *Peters* v. *Tunell*, 43 Minn. 473 (45 N. W. Rep. 867; 19 Am. St. Rep. 252). Where one conveyed land to a grantee designated by another, in exchange for a stock of goods, which the latter fraudulently represented and guaranteed to be of a certain value, which was the specified consideration for the land, the former is entitled to a vendor's lien for a balance due him, on account of the deficiency found to exist in the value of the goods, although the grantee was ignorant of such fraud, it appearing that he was a creditor of the owner of the goods and knew that the latter was insolvent. *Jones* v. *Wolfe*, Tenn. (42 S. W. Rep. 216). Construing and applying N. Dak. Rev. Codes, § 4830, which provides that "one who sells real property has a special or vendor's lien thereon independent of possession for so much of the price as remains unpaid and unsecured otherwise than by the personal obligation of the buyer," it is held that only the seller of real property has a vendor's lien thereon for the unpaid purchase price; and one to whom, with the vendor's assent, the vendee has agreed to pay a portion of the purchase money, cannot claim such a lien. *Bray* v. *Booker*, 6 N. Dak. 526 (72 N. W. Rep. 933). Ga. Civ. Code, § 2809 (Code 1882, § 1985), applied—lien of one selling timber. *Giles* v. *Gano*, 102 Ga. 593 (27 S. E. Rep. 730). A vendor's lien is not assignable. *Martin* v. *Martin*, 164 Ill. 640 (45 N. E. Rep. 1007; 56 Am. St. Rep. 219). An assignee of a note given for purchase money reciting that it was given for purchase money due on the land and that a lien was retained to secure its

payment, acquires the benefit of the lien. *Adams* v. *Feeder* Ky. (41 S. W. Rep. 275).

Sec. 960. Vendor's lien—Priority—Enforcement against bona fide purchaser. A vendor's lien reserved by parol cannot be enforced against a subsequent *bona fide* purchaser for value who had no notice thereof. *Yancey* v. *Blakemore*, 95 Va. 268 (28 S. E. Rep. 836). Where the holder of a vendor's lien, for the purpose of enabling the owner to procure a loan on the property, agreed to take a second mortgage to secure his debt, he does not thereby lose his priority as against other liens of which he had no notice and which were prior to the mortgage of the party making the loan because of his notice thereof. *United States Bldg. & Loan Ass'n* v. *Thompson*, Ky. (41 S. W. Rep. 5). A purchaser of a vendor's lien note holding under an unrecorded transfer thereof, is subordinated to a subsequent mortgagee, ignorant of such transfer, who takes a mortgage from the vendee to secure a loan made to him, which he is induced to take by the fraudulent representations of the vendor that his lien had been satisfied. *Southern Bldg. & Loan Ass'n* v. *Brackett*, 91 Tex. 44 (40 S. W. Rep. 719). Where an owner of land under a verbal agreement for the sale of it, places the purchaser in possession, and executes a deed, and places it in the hands of a third person, with direction to deliver it on the purchase money being paid or secured by mortgage, and the grantee induces the holder of the deed to deliver it to him that he may exhibit it as evidence of title, and the grantee does so to one ignorant of the facts, and who in good faith makes him a loan secured by mortgage on the property, the grantor in such case is estopped from setting up his claim to the land or a lien on it for purchase money, against such innocent mortgagee. *Ogden* v. *Ogden*, 4 O. St. 182, distinguished. *Shurtz* v. *Colvin*, 55 O. St. 274 (45 N. E. Rep. 527).

Sec. 961. Vendor's lien—Loss or waiver. A vendor's lien for purchase money is lost in all cases where any security is taken on the land or otherwise, for the whole or part of the purchase money, unless there is an express agreement to the contrary. *McKeown* v. *Collins*, 38 Fla. 276 (21 So. Rep.

108). The mere taking of the vendee's note for the amount of the purchase money, no other security therefor being taken, does not operate as a waiver of the lien. *Knight* v. *Knight*, 118 Ala. 597 (21 So. Rep. 407). A vendor's agreement in his executory contract of sale to take the note of either of two persons for the amount of the purchase price and to make a deed when "said payment is made or secured," does not operate to discharge his lien for purchase money. *Mansfield* v. *Dameron*, 42 W. Va. 794 (26 S. E. Rep. 527; 57 Am. St. Rep. 884). Taking new notes in renewal of the original purchase money notes although in the name of another who has become the owner of the obligations by reason of the death of the original payee, does not constitute a waiver of a vendor's lien. *Curtis* v. *Clarke*, 113 Mich. 458 (71 N. W. Rep. 845). Taking a mortgage from the vendee on land to secure the payment of the purchase money operates as a waiver of the lien. *Fields* v. *Drennen*, 115 Ala. 558 (22 So. Rep. 114); *Shurtz* v; *Colvin*, 55 O. St. 274 (45 N. E. Rep. 527). The acceptance of a mortgage as security for a portion of the unpaid purchase money of the land sold, is a waiver of the vendor's lien for the remainder in the absence of an express agreement that it shall be retained. *Robbins* v. *Masteller*, 147 Ind. 122 (46 N. E. Rep. 330). Citing, *Anderson* v. *Donnell*, 66 Ind. 150; Jones, Liens, § 1087; *Orrick* v. *Durham*, 79 Mo. 174; *Avery* v. *Clark*, 87 Cal. 619 (25 Pac. Rep. 919; 22 Am. St. Rep. 273); *Fish* v. *Howland*, 1 Paige 20. Construing and applying Cal. Civ. Code, § 3046, providing that "one who sells real property has a vendor's lien thereon independent of possession for so much of the price as remains unpaid and unsecured otherwise than by the personal obligation of the buyer," it is held that the lien is waived by the taking of a mortgage, although it has no valid acknowledgement and the record thereof is void on that account. *Lee* v. *Murphy*, 119 Cal. 364 (51 Pac. Rep. 549). Particular facts held insufficient to show a waiver of a vendor's lien. *Jordan* v. *Buena Vista Co.*, 95 Va. 285 (28 S. E. Rep. 321).

Sec. 962. Enforcement of vendor's lien—Practice. A complaint to enforce a vendor's lien, where a note was

given for the purchase price, is fatally defective if it fails to set out the note and allege its nonpayment. *Moore* v. *Moxey's Adm'r*, Ky. (39 S. W. Rep. 420). A complaint to enforce a vendor's lien, need not allege that a defendant who purchased part of the land from the vendee had notice of the lien. Particular allegations held sufficient to show that the plaintiff was owner of the obligation given for purchase money. *Knight* v. *Knight*, 113 Ala. 597 (21 So. Rep. 407). Applying Cal. Civ. Code, § 2911, it is held that an action to enforce a vendor's lien is barred by the same lapse of time which bars an action on the obligation in connection with which the lien is sought to be enforced. *California Sav. Bank* v. *Parrish*, 116 Cal. 254 (48 Pac. Rep. 78). One holding a judgment establishing an attachment lien against property, is not bound by a subsequent decree foreclosing a vendor's lien on the property, and a sale thereunder where he was not made a party to such degree, although he may have had notice of it. His remedy is not by redemption from the sale, but by sale under his judgment. *McDonald* v. *Miller*, 90 Tex. 309 (39 S. W. Rep. 89). In a suit to enforce a purchase money lien reserved in a deed conveying legal title, with only covenant of general warranty, it is not necessary to make prior lienors, holding liens against the property, parties, nor to refer the case to ascertain such liens, unless it appear that the vendor is insolvent. But if the plaintiff in his bill shows such liens, and proposes to have the purchase money go to discharge them, the owners of such prior liens must be parties; and where in such a case, the conveyance contains a covenant for further assurance in addition to a covenant of warranty, the vendor cannot have a decree for his debt until such liens be removed and the holders thereof are necessary parties, except such as have released their liens. *McClaugherty* v. *Croft*, 43 W. Va. 270 (27 S. E. Rep. 246). It is error to decree a sale of land under a vendor's lien to pay the amount admitted to be due on the note secured, where the plaintiff has not waived his lien for an alleged balance in controversy. Ky. Civ. Code, § 694, subd. 3, applied. *Breckinridge* v. *Peebles' Adm'r*, Ky. (38 S. W. Rep. 871). In an action to enforce a vendor's lien, the plaintiff is not entitled to sell improvements placed upon a portion of the land by a rail-

road company which has been conveyed to it for a right of way, although it took with notice of the lien, where such company offers to do equity, but the court has power to ascertain and decree the amount of the purchase price which the railroad company should pay on account of the land conveyed to it. *First Nat. Bank* v. *Thompson*, 116 Ala. 166 (22 So. Rep. 668). Applying W. Va. Code, ch. 131, § 16, it is held that in enforcing a vendor's lien for purchase money, the court in rendering its decree will ascertain the aggregate amount of principal and interest due on the notes executed for such purchase money, for which the vendor's lien is retained, to the date of the decree, and decree that interest be paid on such aggregate from that time. *Triplett* v. *Lake*, 43 W. Va. 428 (27 S. E. Rep. 363). Mill & V. Tenn. Code, §§ 4306, 4308, construed and applied—enforcement of vendor's lien where purchase money is payable in installments. *Green* v. *Jarvis*, Tenn. (42 S. W. Rep. 165).

WASTE.

EPITOME OF CASES.

Sec. 963. What constitutes—Who liable for—Remedies. It is waste for a tenant for life to take petroleum oil from the land. The rule is the same where the life tenant owns the fee in a proportionate part of the real estate. A tenant for life or a tenant in common in sole possession, claiming ownership, taking petroleum oil from the land and converting it to his exclusive use, is liable to account on the basis of rents and profits, not per annual rental; and in case of a life tenant, he is not entitled to have the proceeds invested so that he may have interest thereon during the life estate, but the proceeds go at once to the owner of the next vested estate of inheritance. *Williamson* v. *Jones*, 43 W. Va. 652 (27 S. E. Rep. 411; 64 Am. St. Rep. 891; 38 L. R. A. 694). Cutting openings in a party wall by a lessee, for the purpose of carrying on a business in violation of the terms of his lease, constitutes waste against his lessor, although done with the per-

mission of the other joint owner of the wall. The lessor is entitled to have the waste repaired at once by the fixing of the opening instead of accepting security for reparation at the end of the term. *Klie* v. *Von Broock*, 56 N. J. Eq. 18 (37 Atl. Rep. 469). In Alabama it is held that a purchaser at an execution sale is not liable to the redemptioner for waste. *O' Connor* v. *Bank of Attalla*, 116 Ala. 585 (22 So. Rep. 902). Injunction against waste should be granted to a plaintiff only to the extent to which he shows title to the land. *Wilcox* v. *Blackwell*, 99 Tenn. 852 (41 S. W. Rep. 1061). Under N. C. Code, § 627, a tenant in common may sue his cotenant for waste. *Hinson* v. *Hinson*, 120 N. C. 400 (27 S. E. Rep. 80).

WATERS AND WATER COURSES.

EPITOME OF CASES.

Sec. 964. What constitutes a water course. To constitute a water course the size of the stream is not material; it must, however, be a stream in fact, as distinguished from mere surface drainage occasioned by freshets or other extraordinary causes, but the flow of water need not be continuous. *Town* v. *Missouri Pac. Ry. Co.*, 50 Neb. 768 (70 N. W. Rep. 402). Surface water does not become a water course by being gathered into a ditch and led away, and the proprietor of lands upon which such a ditch runs may divert the water for his own purposes. *Case* v. *Hoffman*, Wis. (72 N. W. Rep. 890). The fact that, because of the level character of the land, the water of a stream spreads over a wide space without apparent banks, does not deprive it of its character as a water course provided it usually flows in a continuous current. *New York, C. & St. L. R. Co.* v. *Hamlet Hay Co.*, 149 Ind. 344 (47 N. E. Rep. 1060). Where a water course fed by springs, disappears in a cranberry marsh two miles wide and three miles long, upon which there is no definite channel or current, the water disappearing either by evaporation or percolation, a water course is held not to exist

on such marsh lands, although below it a well defined water course appears. Casody, C. J., and Marshall, J., dissenting. *Case* v. *Hoffman*, Wis. (72 N. W. Rep. 390).

Sec. 965. What are navigable waters—Public rights. The navigability of a river does not depend upon its susceptibility of being made so by high engineering skill and expenditure of vast sums of money, but upon its natural present conditions. To render a river navigable it need not be perennially so, but the season of navigation must occur regularly and be of sufficient duration and character to subserve a useful public purpose for commercial intercourse. *United States* v. *Rio Grande Dam Irr. Co.*, N. M. (51 Pac. Rep. 674). Citing, *The Daniel Ball*, 10 Wall. 557; *The Montello*, 20 Wall. 431; *Rowe* v. *Bridge Corp.*, 21 Pick. 344; *Haines* v. *Hall*, 17 Or. 165 (20 Pac. Rep. 841; 3 L. R. A. 609). A stream which is not capable of floating logs in its ordinary state of water, but only when swollen by heavy rains and then only for very short periods, is held not to be navigable as a floatable stream. *Allison* v. *Davidson*, Tenn. (39 S. W. Rep. 905). See opinion for exhaustive review of authorties on this subject. A private ditch or canal connecting with a navigable stream, which was never used by the public, was not a stream and had no current, and which has been partially abandoned and filled up, does not constitute a public navigable water way so as not to be subject to condemnation for public use. *Ligare* v. *Chicago, M. & N. R. Co.*, 166 Ill. 249 (46 N. E. Rep. 808). The public has a right of navigation and fishing in the navigable waters of the open bays of Lake Erie in Ohio. *Bodi* v. *Winous Point Shooting Club*, 57 O. St. 226 (48 N. E. Rep. 944).

Sec. 966. Subterranean or percolating waters. In the recent case of *Case* v. *Hoffman*, Wis. (72 N. W. Rep. 390), the supreme court of Wisconsin say: "Subsurface currents or percolations which do not follow definite and known channels are not governed by the rules respecting the use and diversion of water courses, but, although of considerable volume, are treated in law the same as surface water. The water is deemed to be part of the soil itself, and, to the

same extent, subject to whatever disposition the owner of the land may choose to make; and, if some damages happen to an adjacent proprietor, by the interception of some subterranean current, that is *damnum absque injuria*. This is established by the great weight of authority. *Goodale* v. *Tuttle*, 29 N. Y. 459–466; *Village of Delhi* v. *Youmans*, 45 N. Y. 362; *Phelps* v. *Nowlen*, 72 N. Y. 39 (28 Am. Rep. 93); *Barkley* v. *Wilcox*, 86 N. Y. 140–147 (40 Am. Rep. 519); *Bloodgood* v. *Ayers*, 108 N. Y. 400 (15 N. E. Rep. 433; 2 Am. St. Rep. 443); *Greenleaf* v. *Francis*, 18 Pick. 117; *Davis* v. *Spaulding*, 157 Mass. 431 (32 N. E. Rep. 650; 19 L. R. A. 102); *Bassett* v. *Manufacturing Co.*, 43 N. H. 569 (82 Am. Dec. 179); *Swett* v. *Cutts*, 50 N. H. 439 (9 Am. Rep. 276); *Chatfield* v. *Wilson*, 28 Vt. 49; *Roath* v. *Driscoll*, 20 Conn. 533 (52 Am. Dec. 352); *Frazier* v. *Brown*, 12 O. St. 294; *Hanson* v. *McCue*, 42 Cal. 303 (10 Am. Rep. 299); *Railroad Co.* v. *Dufour*, 95 Cal. 615 (30 Pac. Rep. 783; 19 L. R. A. 92); *Gould* v. *Eaton*, 111 Cal. 639 (44 Pac. Rep. 319; 52 Am. St. Rep. 201); *Wheatley* v. *Baugh*, 25 Pa. St. 528 (64 Am. Dec. 721); *Haldeman* v. *Bruckhart*, 45 Pa. St. 514 (84 Am. Dec. 511); *Coleman* v. *Chadwick*, 80 Pa. St. 81 (21 Am. Rep. 93); *Mosier* v. *Caldwell*, 7 Nev. 363; *Taylor* v. *Welch*, 6 Or. 198; *Chesley* v. *King*, 74 Me. 164 (43 Am. Rep. 569); *Ocean Grove Camp Meeting Ass'n* v. *Commissioners of Asbury Park* 40 N. J. Eq. 447 (3 Atl. Rep. 168); *Acton* v *Blundell*, 12 Mees. & W. 324; *Rawstron* v. *Taylor*, 11 Exch. 369; *Chasemore* v. *Richards*, 7 H. L. Cas. 349." Particular evidence examined and held insufficient to show that the water of a spring disappearing within the limits of the owner's land, thereafter joins with another channel to form the bed of a particular stream. *Farwell* v. *Sturgis Water Co.*, 10 S. Dak. 421 (73 N. W. Rep. 916).

Sec. 967. Mill dams and water rights. A covenant to contribute toward the expense of keeping a dam in repair, does not bind the covenantor to contribute toward building a new dam in case the old one should perish or be destroyed. *Trudeau* v. *Field*, 69 Vt. 446 (38 Atl. Rep. 162). The right of flowage and to build a dam, granted by deed, is not lost by a change in the channel of the stream acquiesced in by all

parties, nor by nonuser for nineteen years. *Clinton Gas Light Co.* v. *Fuller*, 170 Mass. 82 (48 N. E. Rep. 1024). The owner of a mill dam, the operations of whose mill has not been impeded, cannot recover damages from an upper owner on account of his rightful use of the water, reducing the amount so as to damage the dam by exposing it to the sun. *Louisville & N. R. Co.* v. *Beauchamp*, Ky. (40 S. W. Rep. 679). Particular case in which one was held to be estopped to recover damages resulting from the flooding of his lands caused by the opening of the gates of a dam. *Alexander* v. *Winters*, 23 Nev. 475 (49 Pac. Rep. 116). One entitled to receive waters naturally flowing in a stream, to supply a mill dam, may enjoin a municipality engaged in draining a highway, from withdrawing such waters from his dam, although the loss resulting to him wonld be small in comparison with the benefits accruing to the public and owners of low lands. *Stock* v. *Jefferson Tp.*, 114 Mich. 357 (72 N. W. Rep, 132; 38 L. R. A. 355). N. H. Gen. Laws, ch. 141, §§ 15, 16, construed and applied—assessment of damages for flowing lands by dams erected by mill owners. *Chapman* v. *New Market Mfg. Co.*, 67 N. H. 180 (38 Atl. Rep. 16). Where a grant of the right to draw water from a dam stipulates that it is not to be used "to the injury of privileges granted heretofore" the holders of such privileges are under no obligation to contribute to the rebuilding of the dam in case of its destruction. *Trudeau* v. *Field*, 69 Vt. 446 (38 Atl. Rep. 162). The grantee of a right to take from a bulkhead and flume "the quantity of water which shall be discharged therefrom through an aperture of 200 square inches at the gate under fifteen feet head" is entitled to a constant power equivalent to a stream of water discharged through such an aperture with such a head, and the aperture should be enlarged as the head falls, and diminished as it rises. *Cummings* v. *Blanchard*, 67 N. H. 268 (36 Atl. Rep. 556). Under a grant of lands and water privileges, the easement being of so much water as will operate a mill which is upon the lands conveyed, the grantee is entitled to the use of the water for any purpose he sees fit, provided the quantity used is not increased, and the change in the use does not prejudice the rights of others. Where a conveyance of a "mill seat" contains a grant of a right to flow other lands of the

grantor for the purpose of a mill pond, such grant carries with it, as an incident, the right to enter and clean the pond. *Fountain* v. *City of Perth Amboy*, 60 N. J. L. 410 (38 Atl. Rep. 676). A lessee of a water power has no other or greater rights in respect to the accumulation of water, than his lessor possessed. *Smith* v. *Youmans*, 96 Wis. 108 (70 N. W. Rep. 1115; 65 Am. St. Rep. 30; 37 L. R. A. 285). For construction of a particular deed granting water rights in a water power canal and determination of questions of pleading and practice in an action for their enforcement, see *Powers* v. *Hibbard*, 114 Mich. 583 (72 N. W. Rep. 339). For particular case construing conveyances of water rights and discussing the rights, liabilities, and powers of tenants in common of a water power in reference to conveyances, possession, creation of easements, and partition, see *Forest Milling Co.* v. *Cedar Falls Mill Co.*, 103 Ia. 619 (72 N. W. Rep. 1076).

WILLS.

EPITOME OF CASES.

Sec. 968. Agreement to make a will—What constitutes a will—Title by. An agreement to make a disposition of property by will, may be enforced against the promisor's devisee. An executor who has turned over all the estate to a sole devisee is not a necessary party to an action to enforce such contract, nor are the heirs of the testator. *Fogle* v. *Protestant Epis. Church*, 48 S. C. 86 (26 S. E. Rep. 99). A lease, to begin upon its execution, made by a wife to her husband during his natural life, rent free, cannot be probated as a will of the lessor. *In re Ogle's Estate*, 97 Wis. 56 (72 N. W. Rep. 389). A joint will executed by two persons cannot be probated as such until after the death of both of them, but it may be probated as the will of one of the parties on his death, and subsequently probated as the will of the other after his death where there has been no intervening revocation. *In re Davis' Will*, 120 N. C. 9 (26 S. E. Rep. 636; 58 Am. St. Rep. 771; 38 L. R. A. 289). Title to land by devise can only be acquired when the will is duly executed,

proved and recorded according to the laws of the state in which the land is situated. *Emmons* v. *Gordon*, 140 Mo. 490 (41 S. W. Rep. 998; 62 Am. St. Rep. 734); *Evansville Ice & Cold Storage Co.* v. *Winson*, 148 Ind. 682 (48 N. E. Rep. 592). The last case holds that the same law governs in determining when a devise of real estate is revoked. A devisee under a will takes subject to the superior equities and rights of the creditors of the testator. *Pearson* v. *Gillenwaters*, 99 Tenn. 446 (42 S. W. Rep. 9; 63 Am. St. Rep. 844); 99 Tenn. 462 (42 S. W. Rep. 199.)

Sec. 969. As to the validity of devises of real estate. A devise to a corporation which has not the power to take the property is void, and the law will vest the title in the heir. *House of Mercy* v. *Davidson*, 90 Tex. 529 (39 S. W. Rep. 924). A devise of all of testator's "up land" is not void on its face for uncertainty and parol evidence is admissible to show what lands the testator intended to devise. *Vandiver* v. *Vandiver*, 115 Ala. 328 (22 So. Rep. 154). Construing and applying W. Va. Code, ch. 77, § 18, it is held that if a will can be proved independently of the testimony of an attesting witness beneficially interested therein, a devise or bequest to such witness or her husband is not void. *Davis* v. *Davis*, 43 W.Va. 300 (27 S. E. Rep. 323). Where the only provisions in a will designating the beneficiary were: "4th. Whoever shall take care of me, and maintain, nurse, clothe, and furnish me with proper medical treatment at my request, during the time of my life yet when I shall need the same, shall have all of my property of every name, kind, and description left at my death. 5th. The person or persons who shall be selected by me to earn my estate, as provided in 4th clause, shall have a written statement signed by me to that effect, to entitle her, him, or them to my estate," it was held that the will was not invalid on account of the failure to designate the devisee, and that a letter written by the testatrix to one claiming the right to the property under the will, requesting her to come and take care of the testatrix during her last illness, was admissible to aid in identifying the beneficiary entitled to receive under the will. *Dennis* v. *Holsapple*, 148 Ind. 297 (47 N. E. Rep. 631; 62 Am. St. Rep. 526).

Sec. 970. Construction of wills—Value of precedents. Precedents in will cases are not very satisfactory aids in reaching a conclusion in the work of interpretation, for each will differ in its scheme as in its form of expression. *Clay* v. *Wood*, 153 N. Y. 134 (47 N. E. Rep. 274). In the recent case of *Heard* v. *Read*, 169 Mass. 216 (47 N. E. Rep. 778), the supreme court of Massachusetts say: "The present tendency in this country is against absolute rules of construction, and in favor of a careful consideration of the particular language of each will, as well as of its general scope and purpose, in order to determine, in view of the circumstances known to the testator when the will was made, the testator's intention as expressed in it. *Sears* v. *Russell*, 8 Gray 86; *Knowlton* v. *Sanderson*, 141 Mass. 323 (6 N. E. Rep. 228); *Fargo* v. *Miller*, 150 Mass. 225 (22 N. E. Rep. 1003; 5 L. R. A. 690); *Wood* v. *Bullard*, 151 Mass. 324 (25 N. E. Rep. 67; 7 L. R. A. 304); *Peck* v. *Carlton*, 154 Mass. 231 (28 N. E. Rep. 166); *Eager* v. *Whitney*, 163 Mass. 463 (40 N. E. Rep. 1046); *Delaney* v. *McCormick*, 88 N. Y. 174; *Hardy* v. *Gage*, 66 N. H. 552 (22 Atl. Rep. 557); *Robinson* v. *Orphan Asylum*, 123 U. S. 702 (8 Sup. Ct. Rep. 327)."

Sec. 971. Construction of wills—Rules for—General principles. Wills will be construed in favor of vesting estates. *Brice* v. *Horner*, Tenn. (38 S. W. Rep. 440). Citing, *Schofield* v. *Olcott*, 120 Ill. 362 (11 N. E. Rep. 351); *Byrnes* v. *Stilwell*, 103 N. Y. 453 (9 N. E. Rep. 241; 57 Am. Rep. 760); *Gobel* v. *Wolf*, 113 N. Y. 405 (21 N. E. Rep. 388; 10 Am. St. Rep. 464). Courts are averse to construing conditions to be precedent where they might defeat the vesting of estates under a will. *Congregational Church Bldg. Soc.* v. *Everett*, 85 Md. 79 (36 Atl. Rep. 654; 60 Am. St. Rep. 308). A definite devise of a less estate than the fee will not be enlarged to a fee simple because no disposition is made of the fee by the will. *Rusk* v. *Zuck*, 147 Ind. 388 (45 N. E. Rep. 691). In the absence of an intention to that effect clearly manifested, a devise in fee will not be cut down to a lesser estate by a subsequent clause providing how the propery shall go in case the devisee dies without children or issue.

Keating v. *McAdoo*, 180 Pa. St. 5 (36 Atl. Rep. 218); *In re Engel's Estate*, 180 Pa. St. 215 (36 Atl. Rep. 727). Nor by the expression of the testator's "desire and request" as to what use and disposition the devisee shall make of the property. *Clay* v. *Wood*, 153 N. Y. 134 (47 N. E. Rep. 274). Where the punctuation in a will accords with the sense, the use of a capital in the middle of a sentence may be regarded as accidental and should not be permitted to confuse a construction otherwise reasonably clear. *Kinkele* v. *Wilson*, 151 N. Y. 269 (45 N. E. Rep. 869). Where the language is not clear, or where the meaning is doubtful, the courts will not favor an interpretation that revokes a devise once given, or disinherits an heir, or devests a remainder in fee once vested, or excludes issue from a remainder originally limited upon the life estate of a parent, or prevents the issue of a deceased child from participation in the distribution of the estate. *Goodwin* v *Coddington*, 154 N. Y. 283 (48 N. E. Rep. 729). The partial revocation of a will by codicil will not be extended beyond the clear intention of the testator. *McGehee* v. *McGehee*, 74 Miss. 386 (21 So. Rep. 2). A devise to one for life with remainder to his heirs, does not lapse by the death of the first devisee before the death of the testator. *Brice* v. *Horner*, Tenn. (38 S. W. Rep. 440). The right of an illegitimate child of a devisee to take property under the will as an "heir of his body" is to be determined by the law of the testator's domicile at the time of the execution of the will. *Keith* v. *Eaton*, 58 Kan. 732 (51 Pac. Rep. 271). A devise of the use and occupancy of land passes an estate in the land, and consequently a right to let or assign it, and is not confined to the personal use or occupancy of the property, unless the context clearly calls for the more limited construction. *Wilson* v. *Curtis*, 90 Me. 463 (38 Atl. Rep. 365). Every devise of a future interest which is not preceded by an estate of freehold created by the same will, or which being so preceded is limited to take effect before or after and not at the expiration of such prior estate of freehold, is an executory devise. *Ryan* v. *Monaghan*, 99 Tenn. 338 (42 S. W. Rep. 144). Where a testamentary disposition is made to a class and possession is postponed, it includes all persons within the class at the time to which possession is postponed. Cal.

Civ. Code, § 1337, applied. *In re Cavarly's Estate*, 119 Cal. 406 (51 Pac. Rep. 629). A future and contingent devise or bequest to a class takes effect on the happening of the contigency on which the limitation depends only in favor of those objects who at that time come within the description. *In re Allen*, 151 N. Y. 243 (45 N. E. Rep. 554). In the absence of a contrary intention clearly expressed, where there is a devise to several persons by name, to be equally divided among them, they take as tenants in common and not as joint tenants or as a class. *Frost* v. *Courtis*, 167 Mass. 251 (45 N. E. Rep. 687). Where a devise is to several persons designated by name, in equal shares, without the use of any word applying strictly to a class, or anything requiring a class to satisfy the scheme of the will, the devisees take distributively, as tenants in common, and not as a class and the interests of those dying before the testator are deemed to have lapsed. *Moffett* v. *Elmendorf*, 152 N. Y. 475 (46 N. E. Rep. 845).

Sec. 972. Construction of wills as to property embraced—Statutes construed—Particular cases. Under Wis. Rev. Stat., § 2278, providing "every devise of land in any will should be construed to convey all the estate of the devisor therein, which he could lawfully devise, unless it shall clearly appear by the will that the devisor intended to convey a less estate," it is held that a residuary devisee takes at once on the death of the testator all the real estate devised to him, subject only to the intervening life estate. *Hall* v. *Hall*, 98 Wis. 193 (73 N. W. Rep. 1000.) A statute (Conn. Gen. Stat., § 537) which provides that "every devise purporting to convey all the real estate of the testator shall be construed to convey all the real estate belonging to him at the time of his decease, unless it shall clearly appear by his will that he intended otherwise," is held not to apply to a devise which provides that "from and after the decease of my wife, I give my brother, W. E., the residue or remainder of my real estate, being a lot of land adjoining his own", so as to pass to such brother land subsequently acquired by the testator which did not join the brother's land or the lot mentioned. *Whecler* v. *Brewster*, 68 Conn. 177 (36 Atl. Rep. 32). Where a will specially refers to a particular recorded deed as containing a

description by metes and bounds of the property intended to be devised, it will pass title only to the land embraced in such deed, although a partial intestacy may result from such construction, as the rule in respect to presumptions against partial intestacy can have no controlling effect where the language used by the testator is plain and unambiguous. *Oldham* v. *York*, 99 Tenn. 68 (41 S. W. Rep. 333). A devise of the testatrix's "unimproved" real estate passes leased premises upon which are buildings belonging to her tenants. *Coles* v. *Coles*, N. J. Eq. (37 Atl. Rep. 1025). Where a testator's residence and tenant houses owned by him were all situated upon one lot which he acquired at a single purchase, a devise of a life estate in "my home place where I now live," was held to carry only the house occupied by the testator and the enclosure about it, with such use of the outbuildings and entrances as he enjoyed. *McKeough's Estate* v. *McKeough*, 69 Vt. 34, 41 (37 Atl. Rep. 275). A testator's devise of "all the money and estate and property of every kind to which I may be entitled at the time of my death," was held to pass to the devisee his estate in reversion in land which he had conveyed to another for life with the provision that it should rever to him on the death of the grantee. *Balkely* v. *Quinlan*, Ky. (39 S. W. Rep. 513). A testatrix's devise of "real estate" derived from her deceased son, does not pass land which she purchased upon foreclosure of mortgages which he bequeathed to her. *Coles* v. *Coles*, N. J. Eq. (37 Atl. Rep. 1025).

Sec. 973. Construction of wills—Devise of remainder after termination of life estate. Where a devise over after a life estate rests upon a contingency the happening of which is an impossibility, the devise over fails. *Hadley* v. *Hadley*, 147 Ind. 423 (46 N. E. Rep. 823). A devise of a testator's "home property" to his wife "for and during her natural life, for the joint use and benefit of herself and four children," with fee simple title to go to the children share and share alike, is held to create an active trust for the joint use and benefit of the wife and four children, and that the limitation over takes effect on the termination of the life estate. Partition of such estate cannot be had during the continuance of the trust.

Muldoon v. *Trewhitt*, Tenn. (38 S. W. Rep. 109). Construing a devise to the testator's wife for life providing that "after the death of my said wife, all the remainder of my estate, both real and personal, shall be divided equally among my surviving children and their heirs," it is held that the words of survivorship relate to the time of the testator's death and not to the time of the widow's death. *Grimmer* v. *Friederich*, 164 Ill. 245 (45 N. E. Rep. 498). Where a testator devised lands to his wife during her life and after her death to his three sons, H., A. and A. J., "during the term of their natural lives and then to the children that each may have surviving him," it is held that the children take *per stirpes*. *Bethea* v. *Bethea*, 116 Ala. 265 (22 So. Rep. 561).

Sec. 974. Construction of wills—Devise over in case first taker dies without issue. Ordinarily a stipulation in a will conditioned upon the devisee dying without issue or children, has reference to his death before the testator. *In re Engel's Estate*, 180 Pa. St. 215 (36 Atl. Rep. 727); *Moore* v. *Gary*, 149 Ind. 51 (48 N. E. Rep. 630). In the absence of a stipulation to the contrary, where there is a devise over to a certain class, in the event of the first devisee dying without issue, the persons entitled to the benefit of such a devise are to be determined as of the time of the decease of such devisee. *Welch* v. *Brimmer*, 169 Mass. 204 (47 N. E. Rep. 699); *Madison* v. *Larmon*, 170 Ill. 65 (48 N. E. Rep. 556; 62 Am. St. Rep. 356). Although in Virginia the settled rule is "that after a bequest or a devise of an estate for the life of the first taker, words of survivorship in a will are always to be referred to the period of the testator's death when no special intent appears to the contrary," it is held that where real estate is devised by a testatrix to her nephew, "and at his death to his surviving children," and the will made other bequests to "his children," all of such nephew's children living at his death take an estate in the property devised. *Cheatham* v. *Gower*, 94 Va. 388 (26 S. E. Rep. 853). Where a devise to a testator's daughter for life with remainder to the heirs of her body subject to the right of her surviving husband to a life interest therein, provided that should any of the "children herein named die without issue, the property shall revert to the sur-

viving brothers and sisters or their heirs," it is held that the death of the daughter without surviving children did not defeat the husband's life estate. *Hatchett* v. *Henderson Trust Co.*, Ky. (39 S. W. Rep. 235). Where a testator's devise of real estate to his two grandsons, naming them, subject to a life estate in favor of their mother, provided that in case either of them "should die before their mother, or before they arrive at the age of 21 years, then the one living shall possess the whole of the above farm, and in case both die before their mother, or before they arrive at the age of 21 years, leaving no issue, then I ordain and beqeath the whole of the above described property to" certain other grandchildren named, it is held that where one of the grandsons after passing the age of 21 died before his mother, leaving a wife and children, his children are entitled to inherit his portion upon the death of his mother. *Kelley* v. *Kelley*, 182 Pa. St. 131 (37 Atl. Rep. 830).

Sec. 975. Construction of wills—Devise for life with power of disposal. Where a testator's will gives his wife a life estate, " with full power to use and dispose of the same as she shall deem right and proper," and contains a devise over of the remainder of the estate after the death of his wife, she cannot dispose of the estate by will. *Ford* v. *Ticknor*, 169 Mass. 276 (47 N. E. Rep. 877). Construing a will which gave to the testator's wife the use, income, improvements and avails of all the rest and residue of my estate whether real or personal, for her to have and to hold, use, possess and enjoy so long as she remains my widow, or until her decease, and a codicil appointed her admistratrix with the privilege of using as much of the principal as she may desire for her comfort and maintenance, with full power and authortiy to sell and legally convey any of my estate, both real and personal as she may see fit and to freely use the avails thereof as long as she remains my widow, it is held that the widow does not take an absolute estate in the rest and residue; that she is entitled to the possession of the real estate; that she is confined to what she may require " for her comfort and proper maintenance and support;" and so long as she conducts herself reasonably and in good faith, the amount she may appropriate to her support

must be left to her own discretion, but wastefulness may be enjoined. *Little* v. *Geer*, 69 Conn. 411 (37 Atl. Rep. 1056). A devise by a testatrix to her sister for life " to be disposed of at her discretion, at her decease to go to my next of kin," limits the devisee's power of disposition to her life and she cannot dispose of the property by will. The words " next of kin," mean the next blood relation of the testatrix at the time of her death. *Keniston* v. *Mayhew*, 169 Mass. 166 (47 N. E. Rep. 612). Where property devised to the testator's wife for life was charged with her support and power given her to sell and convey it absolutely, but it was provided that she should have only a life estate in the proceeds of such sale, it is held that her conveyance to one in consideration of his agreement to support her for life, did not give the grantee a fee, but such grantee might elect to consider the conveyance as creating a lien on the land for the value of such support less the value of the use of the land. *Gadd* v. *Stoner*, 118 Mich. 689 (71 N. W. Rep. 1111).

Sec. 976. Construction of particular wills. Where a devise to a testator's daughter empowers her to dispose of one-third of the estate devised upon her death, the other two-thirds to go to her children if she has any, if not, " to be distributed to my other children as she may direct," it is held that the devisee dying without children cannot dispose of two-thirds of her estate among the children of the testator so as to disinherit any one of them. *Clay* v. *Smallwood*, 100 Ky. 212 (38 S. W. Rep. 7). Where a devise is made to the testator's son, R., and daughter, C., of a certain farm, in equal shares, which provides that " if my daughter, C., dies unmarried her brother, R., shall have what remains of her share of my property, and if she marries, then her brother, R., shall pay her $1,000 as her share of my estate," it is held that the quoted words refer to the marrying or dying unmarried during the testator's lifetime and not after. *In re Jackson's Estate*, 179 Pa. St. 77 (36 Atl. Rep. 156). Where a will gave the testator's son an option to purchase certain lands at a fixed price after the termination of the life estate created therein by the will, the time within which such option is to be exercised not being mentioned or limited nor any particular mode for its

exercise indicated, and it appears that before the termination of the life estate the son had fully determined to exercise the option, but was prevented from doing so afterwards in any formal manner by disease or death, it is held that the option may be exercised by his heir. *Parker* v. *Seeley*, 56 N. J. Eq. 110 (38 Atl. Rep. 280). A will which gave to the testator's wife all of his property real and personal "for her sole benefit," and after appointing her guardian of his son and executrix of the will, provided, "but if one or the other dies, the one that survives the other take it all," is held to give the wife a life estate with remainder in fee to the son, but if she survive the son her life estate will be merged in the fee. *In re Littlewood's Will*, 96 Wis. 608 (71 N. W. Rep. 1047). A provision in a devise of land to F., declaring that in case it "shall at any time be subjected, or sought to be subjected, by process of law, to the debts of F., then his estate therein shall *eo instanti* cease," is not violated by the issuance of an execution against F., upon which a homestead exemption was laid off in other land, where the execution was returned endorsed "no property found after said homestead laid off." *Bryan* v. *Dunn*, 120 N. C. 36 (27 S. E. Rep. 37). Particular will of one holding a life estate under a devise, held to operate as an execution of the power of disposition of the fee, given to her by the will under which she claims. *Bullerdick* v. *Sadlier*, 158 N. Y. 551 (47 N. E. Rep. 920; 40 L. R. A. 666). Where property was devised and bequeathed to a named person, to be held by him in trust for the sole and separate use of a daughter of the testator for and during the term of her natural life, with remainder to the child or children of such daughter living at the time of her death, and in default of such child or children, then to the right heirs of the daughter, the legal title passed to the trustee as to the life estate only. The remainder thus created was a legal, and not an equitable, estate. A successor of the trustee named in the will could not, even under an order granted by a chancellor, sell any greater interest in the property which passed under such a devise than the estate of the life tenant therein. *Fleming* v. *Hughes*, 99 Ga. 444 (27 S. E. Rep. 791). For cases which depend upon particular facts and construe particular wills, see, as to estate devised, *Hopkins* v. *Keaser*, 89 Me. 347 (36 Atl. Rep. 615); *Heard* v.

Read, 169 Mass. 216 (47 N. E. Rep. 778); *Bailey* v. *Fisher*, Ky. (38 S. W. Rep. 140); *Calmes* v. *Eubank*, Ky. (40 S. W. Rep. 669); *Collins* v. *Williams*, 98 Tenn. 525 (41 S. W. Rep. 1056); *Field* v. *Burbridge*, Ky. (42 S. W. Rep. 912); *Young* v. *Harkelroad*, 166 Ill. 318 (46 N. E. Rep. 1113); as to when an estate vests, *Wilhelm* v. *Calder*, 102 Ia. 342 (71 N. W. Rep. 214); *Riggan* v. *Lamkin*, 120 N. C. 44 (26 S. E. Rep. 918); as to creation of a defeasible fee, *Malona* v. *Schwing*, Ky. (39 S. W. Rep. 523); *Daniel* v. *Daniel*, 102 Ga. 181 (28 S. E. Rep. 167); as to creation of a vested estate, *In re Snyder's Estate*, 180 Pa. St. 70 (36 Atl. Rep. 420); as to creation of valid executory devise, *Ryan* v. *Monaghan*, 99 Tenn. 338 (42 S. W. Rep. 144); as to limitation of absolute devise by subsequent clause, *Iimas* v. *Neidt*, 101 Ia. 348 (70 N. W. Rep. 208); as to creation of remainder in joint tenancy, *Simonds* v. *Simonds*, 168 Mass. 144 (46 N. E. Rep. 421); as to devesting a remainder by codicil, *Goodwin* v. *Coddington*, 154 N. Y. 283 (48 N. E. Rep. 729); as to power of sale given an executor, *Potts* v. *Breneman*, 182 Pa. St. 295 (37 Atl. Rep. 1002); *Petit* v. *Flint & P. M. R. Co.*, 114 Mich. 362 (72 N. W. Rep. 238): as to the power and authority of a joint trustee, *Duckworth* v. *Ocean S. S. Co.*, 98 Ga. 193 (26 S. E. Rep. 736); as to designation of beneficiaries, *Rhode Island Hospital Trust Co.* v. *Peckham*, 20 R. I. 382 (38 Atl. Rep. 1001); as to residuary clauses, *Moffett* v. *Ellendorf*, 152 N. Y. 475 (46 N. E. Rep. 845); as to property embraced in a devise of "the old homestead," *Moore* v. *Powell*, 95 Va. 258 (28 S. E. Rep. 172).

Sec. 977. Devises and bequests in lieu of dower —Election. A devise of a life estate to a widow will bar her right to dower unless she elects otherwise, although it contains a provision for its termination in case of her remarriage. *Cooper* v. *Cooper*, 56 N. J. Eq. 48 (38 Atl. Rep. 198). A devise of land to a testator's widow will not be construed to be in lieu of a homestead right, given her by the statute, so as to put her to an election, unless the provisions of the will are so repugnant to the claim of homestead that the two cannot stand together. *Stokes* v. *Pillow*, 64 Ark. 1 (40 S. W. Rep. 580). Ill. Rev. Stat., ch. 41, §§ 11, 12, construed

and applied—renunciation of will by a widow and election to take one-half of the estate after debts and charges are paid, in lieu of dower. *Gullet* v. *Farley*, 164 Ill. 566 (45 N. E. Rep. 972). Construing Ind. Rev. Stat.. 1894, § 2666, which provides that the widow of a person dying testate takes under the will unless within one year after the probate of such will she makes her election to take under the law, it is held that unless the widow elects to take under the law, as required by the statute, her rights are governed by the will, and she is not estopped by the filing of an election to take under the will from afterwards making an election to take under the law, except as to innocent parties who have been induced to deal with the property relying upon the first election. *Dudley* v. *Pigg*, 149 Ind. 368 (48 N. E. Rep. 642. In Iowa it is held that a devise of a life estate to a widow does not bar her right to a distributive share of her husband's real estate, unless made with the express provision that such estate shall be in lieu of dower. *Sutherland* v. *Sutherland*, 102 Ia. 585 (71 N. W. Rep. 424; 63 Am. St. Rep. 477). In Iowa it is held that a widow by probating her husband's will, qualifying as executrix thereunder, and selling land as such, does not operate as an election on her part to take under the will and she is not required to make an election to take under the will, in lieu of her distributive share under the statute, unless there is a devise to her inconsistent with such statutory right. *In re Proctor's Estate*, 108 Ia. 232 (72 N.W. Rep. 516). Construing How. Ann. Mich., Stat., §§ 5750, 5751; Pub. Acts 1881, No. 18, § 1, it is held that where a husband's will gives both real and personal property to his wife, she cannot elect to take under the will as to one and under the statute as to the other. *Crawford* v. *Bloss Estate*, 114 Mich. 204 (72 N.W. Rep. 148).

Sec. 978. Failure of a testator to provide for a child —Statute construed. Construing and applying Cal. Civ. Code, § 1307, providing that "when any testator omits to provide in his will for any of his children or for the issue of any deceased child, unless it appears that such omission was intentional, such child or the issue of such child must have the same share in the estate of the testator as if he had died intes-

tate," it is held that a devise to designated grandchildren, of certain described real estate in a particular county, will prevent their taking as heirs under this statute, although the person making such will had no land in such county at that time and did not subsequently acquire title to any. *In re Callaghan's Estate*, 119 Cal. 571 (51 Pac.Rep.860; 39 L. R. A.689).

Sec. 979. Powers contained in wills. Where a will contemplates an actual division of the estate by the trustees, and payment to the tenants in common in money, a power of sale of land is to be inferred. *Parker* v. *Seeley*, 56 N. J. Eq. 110 (38 Atl. Rep. 280). Where a devisee to whom a power of sale is given, has also an interest in the property in his own right, his deed, if it makes no reference to the power, will convey nothing but his own interest and will not be held to be an execution of the power. *New England Mortg. Sec. Co.* v. *Buice*, 98 Ga. 795 (26 S. E. Rep. 84). A devisee of land during her widowhood, clothed with power of disposition by will, cannot exercise such power in favor of volunteers to the exclusion of her creditors. *Freeman's Adm'r* v. *Butters*, 94 Va. 406 (26 S. E. Rep. 845). A power coupled with a trust survives, and may be executed by one executor when the other dies or renounces the office. The test of such power being coupled with a trust is that a third party has such an interest as will enable him to call on an executor to execute the trust. *Dick* v. *Harby*, 48 S. C. 516 (26 S. E. Rep. 900). See opinion for particular power held to be coupled with a trust.

Sec. 980. Miscellaneous notes. Applying N. J. Revision, p. 1248, by which a will operates upon real property acquired after its execution, it is held that where a devise lapses on account of the death of the devisee before that of the testator, such property passes under the residuary clause of the will, in the absence of a contrary intention clearly manifested. *Molineux* v. *Raynolds*, 55 N. J. Eq. 187 (36 Atl. Rep. 276). S. C. Rev. Stat. 1898, § 1976, construed and applied—limitation over to take effect on the death of any person without heirs of the body. *Bethea* v. *Bethea*, 48 S. C. 440 (26 S. E. Rep. 716). Wis. Rev. Stat., § 2286, construed and applied—provision for unborn child. *Verrinder* v. *Winter*, 98 Wis. 287 (73 N. W. Rep. 1007).

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